STATE OF MICHIGAN
IN THE SUPREME COURT

SKANSKA USA BUILDING, INC.,
A Delaware Corporation,

Plaintiff,

v

M.A.P. MECHANICAL CONTRACTORS, INC.,
a Michigan Corporation,
AMERISURE INSURANCE COMPANY,
a Michigan property and casualty insurer;
AMERISURE MUTUAL INSURANCE COMPANY,
a Michigan property and casualty insurer;
AMERISURE PARTNERS INSURANCE COMPANY,
a Michigan property and casualty insurer,

Defendants.

Supreme Court No.159510

Court of Appeals
Docket Nos: 341589 and 340871

Midland County Circuit Court
Court Case No. 13-9864-CKB

AMICUS CURIAE - CONSTRUCTION ASSOCIATION OF MICHIGAN'S

APPENDIX

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March 6, 2020

AMICUS CURIAE - CONSTRUCTION ASSOCIATION OF MICHIGAN'S APPENDIX

EXHIBIT 1

Forbes v. Darling

Supreme Court of Michigan

January 6, 1893, Argued ; February 17, 1893, Decided

No Number in Original

Reporter
94 Mich. 621 *; 54 N.W. 385 **; 1893 Mich. LEXIS 564 ***

Embree P. Forbes et al. v. James H. Darling and Frank H. Smith.

Prior History: **[***1]** Appeal from Newaygo. (Palmer, J.) Argued January 6, 1893. Decided February 17, 1893.

Disposition: Decree reversed, and defendants enjoined from proceeding to sale under decree enjoined, but without prejudice to any subsequent proceedings to foreclose the mortgage.

Syllabus

Bill to enjoin foreclosure proceedings. Complainants appeal. Reversed, and sale under decree enjoined, but without prejudice to any subsequent proceedings to foreclose the mortgage. The facts are stated in the opinion.

Counsel: George Luton, for complainants.

W. D. Leonardson, for defendants.

Judges: McGrath, J. The other Justices concurred.

Opinion by: McGrath

EXHIBIT 1

Opinion

[*622] **[**386]** James Forbes, the father of the complainants, died October 24, 1871, leaving a last will, the terms of which are as follows:

"*First.* I do hereby give and devise and bequeath to my wife, Francina Forbes, all of my estate, consisting of my farm, situate in the township of Dayton, aforesaid, and known and described as the north-east quarter of section number thirty (30), in township number thirteen (13) north, range number **[***4]** fourteen (14) west, together with all of my personal estate, consisting of farm implements, teams, stock, grain, etc.

"*Second.* I do also hereby constitute and appoint my said wife, Francina Forbes, to be sole executrix of this, my last will; directing her first to pay, after my decease, all of my just debts and funeral expenses, and, second, to keep and use the residue of said estate for the support and maintenance of herself and family, and the education of my children.

"*Third.* And, for the better maintenance and education of my children, I hereby commit the guardianship of each and all of my children, until they shall respectively attain the age of 21 years, unto my said wife; and I do hereby **[*623]** declare that the expenses of the maintenance and education of my said children, until they shall attain the age aforesaid, shall be paid and borne by said wife by and out of the moneys and estate given and bequeathed to her in and by this, my will."

Francina Forbes died in 1890. One of the children died in 1879. The others were all of age at the time of the mother's death, except Mary S., who married in the year her mother died.

The widow, in her lifetime, executed a **[***5]** mortgage upon the real estate devised, proceedings to foreclose

which had been commenced prior to her death. The heirs seek to have the proceedings to foreclose enjoined, and the mortgage declared null and void. The contention is that the widow took but a life-estate under the will.

This contention cannot be sustained. The "First' clause of the will devises an estate in fee, without any limitations or words indicating an intention to create a trust estate. The other clauses burden the estate so devised with a duty or trust. The widow took the beneficial interest charged with a trust which was enforceable in equity. She could convey, but such conveyance would be subject to the burden imposed upon the estate. The statute provides that any devise shall be construed to convey all the estate, unless it shall clearly appear that there was an intention to convey a less estate. How. Stat. § 5786. It was held in Bailey v. Bailey, 25 Mich. 185, that the presumption that a testator means to die intestate as to part of his estate will not be raised where the will does not naturally lead to that inference. The construction which we give to the instrument makes every part of the disposition **[***6]** consistent, and disposes of the entire estate, while that contended for creates an intestacy as to the residue of the estate. Mann v. Hyde, 71 Mich. 278; Toms v. Williams, 41 Mich. 552; Rood v. Hovey, 50 Mich. 395. The surplus did **[*624]** not result to the heirs, but belonged to the devisee. *Wood v. Cox*, 1 Keen, 317, 2 Mylne & C. 684; *Irvine v. Sullivan*, L. R. 8 Eq. 673. One of the children had died, the youngest, a daughter, had married, and all the rest were of age, when the mother died; so that no inquiry is necessary as to what part of the estate is needed to maintain and educate the children. *Carr v. Living*, 28 Beav. 644; *Scott v. Key*, 35 Beav. 291; Lewin, Trusts, 139.

It is claimed that the children were not properly educated; that the widow did not support the children until they reached the age of 21 years out of the estate devised; that they contributed to their own support while upon the farm; that finally all, with the exception of the daughter, struck out before they became of age, and have since supported themselves.

The will makes no provision for an accounting, nor does it provide to what extent the children shall be educated. The testator **[***7]** evidently intended to leave the question of the extent of the education of the children to the mother, relying **[**387]** upon her natural affection for them. When the children became of age, the widow took what surplus remained for her own benefit. When the children ceased to be members of the establishment contemplated by the testator and went into another, whatever would have been the rule had they returned before they became of age, the obligation to support them was thereby suspended. The extent of the education, as well as the character of the support, must depend materially upon the conditions and circumstances, and both must necessarily be held to rest largely in the discretion of the mother. It was certainly not the intention of the testator that his widow should remain upon this farm, charged with the support of these six children until they became of age, and that they should be discharged of all obligations to the mother; that they should be supported in idleness; that their **[*625]** time was their own; and that any contribution to their own support, while upon the farm and under her roof, was to be charged up against her. Their duty and obligations to their mother remained unaltered **[***8]** by the burden imposed upon her. While the trust imposed could be enforced in equity, in case of a refusal to support or to provide any opportunity for the education of the children, yet, when the children have been supported, and have been schooled, although the facilities afforded have been meager, the court will not inquire further, or require from her or her estate a retrospective account. *Leach v. Leach*, 13 Sim. 304; *Browne v. Paull*, 1 Sim. (N.S.) 92; *Carr v. Living, supra; Hora v. Hora*, 33 Beav. 88; *Scott v. Key, supra*.

The complainants introduced testimony to show what the intention of the testator was, as expressed in the conversation had with the person who drew that instrument, and with others after its execution. There is no ambiguity on the face of this instrument, and in such case extrinsic evidence is not admissible to show an intent other than that expressed. Kinney v. Kinney, 34 Mich. 250; Waldron v. Waldron, 45 Mich. 350 at 354.

How. Stat. § 5810, has no application to a case like the present, where the will makes provision for the support and education of each and all of the testator's children until they become of age. None are omitted. Provision **[***9]** is made for all.

The validity of the foreclosure proceeding is attacked on the ground that the subpoena issued in the cause, and returned as served, was not styled, "In the Name of the People of the State of Michigan." The subpoena was returned, served, but Francina Forbes did not appear, and the bill was taken as confessed. The statute (section 7290) provides that the style of all process from courts of record in this State shall be, "In the Name of the People of the **[*626]** State of Michigan." Section 35 of article 6 of the Constitution provides that the style of

all process shall be, "In the Name of the People of the State of Michigan."

In *Tweed v. Metcalf, 4 Mich. 579*, and again in *Wisner v. Davenport, 5 Mich. 501*, it was insisted that certain tax rolls were void, because the warrant to the township treasurer was not styled, "In the Name of the People of the State of Michigan;" but the Court held that the commonlaw definition of the term "process" is a writ issued by some court or officer exercising judicial powers, and, further, that the term "process" was intended to mean writs issued in the exercise of that judicial power created and established by the Constitution. **[***10]**

In *Johnson v. Insurance Co., 12 Mich. 216*, the objection was made that the *scire facias* was not tested, "In the Name of the People of the State of Michigan." The Court held that neither the Constitution nor the statute required the writ to be so tested; that the objection, which was a purely technical one, was itself insufficiently taken; and that it was therefore unnecessary to determine whether the Constitution could be satisfied by a substantial compliance therewith. There the *scire facias* was styled as follows: "The People of the State of Michigan;" and the Court held that the fact that the words "In the Name of the People of the State of Michigan" were inserted in the Constitution between inverted commas favored the idea that the phrase must be used *verbatim*.

In the present case the caption of the process was as follows:

"State of Michigan.

"The Circuit Court for the County of Newaygo, in Chancery.

"*To Francina Forbes--Greeting*."

This is not even a substantial compliance with this provision **[*627]** of the Constitution. The object of this provision undoubtedly is to make this style the distinguishing feature of all process. The requirement is constitutional, **[***11]** and the defect jurisdictional.

The decree below must therefore be reversed, and defendants enjoined from proceeding to sale under the decree for foreclosure, without prejudice, however, to any subsequent proceedings to foreclose said mortgage.

Complainants are entitled to the costs of both courts.

The other Justices concurred.

End of Document

EXHIBIT 2

Hawkeye-Security Ins. Co. v. Vector Constr. Co.

Court of Appeals of Michigan

April 3, 1990, Submitted ; September 11, 1990, Decided

Docket No. 109074

Reporter
185 Mich. App. 369 *; 460 N.W.2d 329 **; 1990 Mich. App. LEXIS 355 ***

HAWKEYE-SECURITY INSURANCE COMPANY, Plaintiff-Appellee, v. VECTOR CONSTRUCTION COMPANY, Defendant-Appellant

Disposition: **[***1]** Affirmed.

Counsel: *Howard & Howard Attorneys, P.C.* (by *James E. Lozier* and *Mark H. Canady*), for plaintiff.

Abood, Abood & Rheaume, P.C. (by *William E. Rheaume*), for defendant.

Judges: Wahls, P.J., and Marilyn Kelly and G. S. Allen, * JJ.

Opinion by: ALLEN

Opinion

[*371] **[**330]** In this declaratory judgment action, which raises a question of first impression in Michigan, we are asked to set aside the **[**331]** trial court's grant of summary disposition in favor of plaintiff, Hawkeye-Security Insurance Company, and to conclude that Hawkeye possesses a duty to defend or indemnify defendant, Vector Construction Company, under the terms of a contract of insurance entered into between the parties. We cannot do that which is asked of us.

I

The material facts are not in dispute. Barton-Malow Company, a general contractor in the construction field, entered into a subcontract with Vector, a concrete contractor, on April 5, 1984, pursuant to which Vector agreed to provide all labor, materials and equipment necessary to perform all of the concrete work involved in certain improvements to be made at the Delta Township **[***2]** waste water treatment plant. Vector then contracted with Boichot Concrete Company to provide Vector with concrete meeting certain project specifications. Boichot delivered the concrete to Vector during July, August, and September, 1985. Vector used this concrete to construct the roof of the grit building at the plant. The concrete was also used to construct other improvements to the plant. After the concrete had been poured, testing revealed that the concrete failed to comply with project specifications. Consequently, Delta Township, owner of the plant, demanded corrective **[*372]** measures be taken. Vector removed and repoured 13,000 yards of concrete.

Subsequently, Vector filed suit against Boichot, alleging breach of contract, breach of express and implied warranties, and negligence. Barton-Malow filed suit against Vector alleging breach of contract, and against Boichot, alleging negligence, breach of express and implied warranties, and breach of contract under a third-party beneficiary theory.

Vector, in addition to filing suit against Boichot, notified Hawkeye, its insurance carrier, of the incident and filed a claim with Hawkeye. Hawkeye denied coverage and filed **[***3]** a complaint for declaratory relief on February 13, 1987, in Clinton Circuit Court. On Vector's motion venue was changed to Ingham Circuit Court.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

EXHIBIT 2

Hawkeye moved for summary disposition under MCR 2.116(C)(10) on April 6, 1988. By opinion and order dated April 22, 1988, the court granted Hawkeye's motion, finding in part:

> Said policy, when read as a whole, is unequivocal in that it does not provide coverage for property damage to work product due to faulty workmanship. The defect in the concrete supplied to Respondent by its supplier does not constitute an "occurrence" as defined in the policy. Further, the exclusions under the broad form comprehensive general liability policy endorsement excludes [sic] coverage for the restoration, repair or replacement of property, not on the premises of the insured, which has been made or is necessary by reason of faulty workmanship by or on behalf of the insured.

Vector's motion for reconsideration was denied on May 16, 1988. Vector now appeals as of right.

II

A trial court may summarily dispose of a claim **[*373]** where, except as to the amount of damages, there exists no genuine issue of material fact and the moving party is entitled **[***4]** to judgment as a matter of law. MCR 2.116(C)(10). Before the court may summarily dispose of a claim under this court rule, the court must determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ, giving the benefit of reasonable doubt to the nonmovant. Dumas v Automobile Club Ins Ass'n, 168 Mich App 619, 626; 425 NW2d 480 (1988). All inferences are to be drawn in favor of the nonmovant. Dagen v Hastings Mutual Ins Co, 166 Mich App 225, 229; 420 NW2d 111 (1987), lv den *430 Mich 887 (1988)*. Before judgment may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. Peterfish v Frantz, 168 Mich App 43, 48-49; 424 NW2d 25 (1988).

[332]** III

Vector secured from Hawkeye the insurance policy in question. This policy contains two sections, one defining the parameters of property coverage and a second defining the parameters of comprehensive general liability **[***5]** coverage. The latter includes coverage for all sums which Vector becomes legally obligated to pay as damages arising from bodily injury or property damage "caused by an occurrence." The insurance contract defines "occurrence" as follows:

> "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . .

[*374] The contract does not define the term "accident."

In Frankenmuth Mutual Ins Co v Kompus, 135 Mich App 667, 678; 354 NW2d 303 (1984), lv den *421 Mich 863 (1985)*, a panel of this Court, being called upon to define the term "accident" as contained in an insurance contract definition of "occurrence" which is substantially similar to the definition quoted in the preceding paragraph, adopted the following definition:

> "'An "accident," within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected **[***6]** thereby -- that is, takes place without the insured's foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.'" Guerdon Industries, Inc v Fidelity & Casualty Co of New York, 371 Mich 12, 18-19; 123 NW2d 143 (1963), quoting 10 Couch on Insurance (2d ed), § 41:6, p 27.

Vector argues that its defective workmanship, e.g., use of inferior concrete supplied to it by Boichot, gave rise to causes of action against Boichot sounding in negligence and breach of warranty and that misdeeds that give rise to such causes of action have been held by courts in other jurisdictions to constitute "accidents" for purposes of establishing "occurrences" within the meaning of similarly worded insurance contracts. Whether Vector's alleged defective workmanship constitutes an accident/occurrence within the meaning of the insurance contract is a question of first impression in Michigan.

[*375] Vector relies on **[***7]** Bundy Tubing Co v Royal Indemnity Co, 298 F2d 151 (CA 6, 1962), in support of its argument. In that case, Bundy manufactured thin-walled steel tubing which building contractors and plumbers installed in concrete floors for use in radiant heating systems. *Id.* Some of the tubing manufactured by Bundy contained defects that caused the tubing to fail and leak. Several parties then sued Bundy to recover damages to property sustained by reason of the defective tubing. The suits alleged

negligence in the manufacture of the tubing or breach of warranty or both. Royal, Bundy's insurer, defended three of eight suits filed against Bundy. They refused to defend the remaining five suits. Thereafter, Bundy sued Royal seeking to recover the amounts paid out in satisfaction of a judgment rendered against it, in settlement of claims, and in costs and expenses incurred in defending the five suits Royal refused to defend. *Id. at 151-152*.

At issue in Bundy's suit against Royal was the extent of liability coverage offered in two policies of liability insurance that Royal had issued to Bundy. Both policies contained identical provisions **[***8]** which provided that Royal would pay all sums which Bundy became legally obligated to pay as damages arising from "injury to or destruction of property, including the loss of use thereof, *caused by accident*." *Id. at 152*. (Emphasis added.) Additionally, both policies contained a clause excluding coverage for "injury to or destruction of . . . any goods or products manufactured, sold, handled **[**333]** or distributed [by Bundy] . . . out of which the accident arises." *Id.*

The district court held that no duty to defend or indemnify arose under the provisions of the insurance contracts as each of the suits filed against Bundy involved claims of breach of warranties or **[*376]** of negligence and, therefore, the damages were not caused by accident. *Id.*

The United States Court of Appeals for the Sixth Circuit disagreed with the district court's finding that no property was damaged as a result of an accident:

> In our opinion, property was damaged by the installation of defective tubing in a radiant heating system which caused the system to fail and become useless. A homeowner would never have such equipment installed if he knew that it would **[***9]** last only a very short time. A home with a heating system which did not function would certainly not be suitable for living quarters in the wintertime. The market for its sale would be seriously affected.
>
> The failure of the tubing in the heating system in a relatively short time was unforeseen, unexpected and unintended. Damage to the property was therefore caused by accident. [*Id. at 153*.]

The court also disagreed with the district court's conclusions as to the effect the nature of the claims asserted against Bundy had on the scope of coverage.

> The fact that the claims here involved breach of warranty or negligence did not remove them from the category of accident. Bundy would not be legally obligated to pay a claim arising out of an accident occurring without its negligence or breach of warranty. If the liability policy were construed so as to cover only accidents not involving breach of warranty or negligence, then no protection would be given to the insured. The insured would not need liability insurance which did not cover the only claims for which it could be held liable. The word "accident" is common in most liability policies and **[***10]** should not be construed in this type of case as not including claims involving negligence or breach of warranty. [*Id.*]

[*377] The court then concluded that the exclusionary clauses contained in each of the insurance contracts eliminated recovery "for the value of the defective tubing or the cost of new tubing to replace it." *Id.* However, because the failure of the tubing constituted an accident which damaged the property of others, Royal was obligated to indemnify Bundy for sums arising out of damage done to the property, including "[t]he cost of removing defective tubing and the cost of installing new tubing." *Id. at 154*.

We find Vector's reliance on *Bundy* misplaced. *Bundy* stands for nothing more than the proposition that an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by "accidents" where the insured's faulty work product damages the property of others. In the instant case Vector seeks what amounts to recovery for damages done to its own work product, and not damage done to the property of someone other than the insured. Instead, **[***11]** we find the case of *McAllister v Peerless Ins Co, 124 NH 676; 474 A2d 1033 (1984)*, to be more instructive.

In *McAllister*, the plaintiff operated a landscape and excavation business. In 1979, a gentleman named Finkelstein hired McAllister to landscape his property and to construct a leach field on it. In 1980, Finkelstein sued McAllister for breach of contract, alleging faulty workmanship in constructing the leach field and in performing the landscaping and seeking damages "to pay for correcting the allegedly defective work." Finkelstein did not assert that McAllister's defective work caused damage to any property other than the work product. Moreover, he did not claim any damage to the work product other than defective workmanship. *Id. at 678*.

[*378] In response to Finkelstein's suit, McAllister filed a declaratory judgment action to determine coverage. *Id.* The New Hampshire Supreme Court found no coverage **[**334]** under the policy issued to McAllister by Peerless Insurance Company. *Id.* at 679. In so doing, the court analyzed the definition of "occurrence" contained within the policy issued to McAllister, **[***12]** which is almost identical to the definition at issue here, and concluded:

> The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship. . . . Despite proper deference, then, to the reasonable expectations of the policyholder, . . . we are unable to find in the quoted policy language a reasonable basis to expect coverage for defective workmanship. [*Id. at 680*.]

The court then went on to hold that a general grant of coverage contained in a general coverage provision does not give rise to coverage for the cost of correcting defective work. *Id. 680-681*.

We agree with both the reasoning and the conclusion as expressed by the *McAllister* court. Accordingly, we hold that the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract. Summary disposition was properly granted on this issue.

IV

Vector next appears to argue that regardless whether the use of inferior concrete constituted an occurrence within the meaning of the insurance contract it is still entitled to coverage because the removal and replacement of the grit building roof constituted **[***13]** "physical injury to or destruction of **[*379]** tangible property" within the meaning of "property damages" as defined by the contract and, under the terms of the insurance contract, "Hawkeye must pay all sums that Vector had become legally obligated to pay because of property damage." Vector is mistaken.

The insurance contract defines "property damages" as either:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period . . . .

This definition appears under the heading "Definitions Applicable To Section II." Section II requires that property damages arise out of an "occurrence" before Hawkeye is required to provide coverage. As the use of inferior cement does not constitute an occurrence within the meaning of the insurance contract, the condition precedent for seeking coverage for property damage has not been met. This definition does not give rise to a duty to defend or indemnify.

V

Vector argues **[***14]** that the trial court incorrectly relied on exclusion (n) in granting summary disposition to Hawkeye. Exclusion (n) provides:

> This insurance does not apply
> * * *
> to property damage to the named insured's products arising out of such products or any part of such products . . . .

[*380] Vector asserts that this exclusion, contained in the main text of the insurance contract, is superseded by three endorsements or riders to the general insurance contract. We disagree.

When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail. *Peterson v Zurich Ins Co, 57 Mich App 385, 392; 225 NW2d 776 (1975)*.

Vector first asserts that exclusion (n) is superseded by the language set forth on the cover sheet of the "Special Multi-Peril Policy" endorsement. This language provides in pertinent part:

> In consideration of the payment of premium and in reliance upon the staements [sic] in the Declarations and subject to the Limit of Liability, Exclusions, Conditions, and other terms of this policy, the Company . . . agrees with the **[**335]** insured . **[***15]** . . to provide coverage with respect to those designated premises, coverages and kinds of property for which a specific limit of liability is shown in the Declarations.

This language is merely a preface to the "Special Multi-Peril Policy." It states only that coverage is supplied as indicated in the policy and the exclusions. Accordingly, it does not contradict and hence supersede exclusion (n).

Vector's second assertion is that an "Extension Schedule," form no. GL 200940183, supersedes

exclusion (n). On this schedule, underneath the heading "Description of Hazards," the following language appears:

> Concrete Construction-including foundations, making, setting up or taking down forms, scaffolds, false-work or concrete distributing apparatus . . . .

When construing the language of an insurance **[*381]** contract, we give such language its ordinary and plain meaning and avoid technical and strained constructions. *Thomas v Vigilant Ins Co, 156 Mich App 280, 282; 401 NW2d 351 (1986)*, lv den *428 Mich 895 (1987)*. If, after reading the entire contract, the language can be reasonably understood **[***16]** in differing ways, the ambiguity is to be liberally construed against the insurer. *Powers v DAIIE, 427 Mich 602, 623-624; 398 NW2d 411 (1986)*.

Turning to the schedule in question, we believe that it is reasonable to infer that a form labeled "Extension Schedule" extends coverage to those items listed on the schedule, including "concrete construction." Our conclusion is bolstered by the following observations about the schedule. First, the schedule lists, next to each item, a premium base, a premium rate, and an advanced premium. Second, at the end of the schedule is the phrase "Additional Coverages," with reference to an attachment. Third, form no. GL 200940183 is expressly listed on the policy declaration sheet as "applying to Section II" of the insurance contract. Accordingly, we conclude that the schedule does extend coverage to concrete construction.

We also conclude that the term "concrete construction" is ambiguous and, by the insurance contract's terms, is not so limited as to exclude construction of a concrete roof.

However, we do not believe our reading of the Extension Schedule is at odds with exclusion (n). **[***17]** In *McAllister*, 124 NH 678-680, the court drew a distinction between coverage of property damage resulting *from* the defective work product and coverage of damage to the work product itself. The court concluded that the former was covered while the latter was not. *McAllister, supra.* We believe that this distinction is properly drawn and equally applicable in the instant case. Reading the general **[*382]** insurance contract provisions in conjunction with the Extension Schedule we can only conclude that the schedule extends coverage to Vector for property damage resulting from inadequate concrete construction, e.g., property of a third party damaged when the concrete roof falls in on that property. Exclusion (n) excludes coverage for damage to the work product, as occurred in the instant case. Accordingly, we conclude that the extension schedule and exclusion (n) are not in conflict and that the former does not supersede the latter.

Vector's third and final assertion is that the following language contained in the "Broad Form Comprehensive General Liability Endorsement" supersedes exclusion (n). The language of this endorsement provides **[***18]** in pertinent part:

> (A) The definition of incidental contract is extended to include any oral or written contract or agreement relating to the conduct of the named insured's business.
>
> (B) The insurance afforded with respect to liability assumed under an incidental contract is subject to the following additional exclusions:
>
> * * *
>
> (4) to any obligation for which the insured may be held liable in an action on a contract by a third party beneficiary for bodily injury or property damage arising out of a project for a public authority; *but this exclusion does not apply to an* **[**336]** *action by the public authority or any other person or organization engaged in the project* . . . . [Emphasis added.]

This endorsement appears on form no. GL 204040682, and this form number is listed on the policy declaration sheet as "applying to Section II." As previously pointed out, there is no liability under § II absent an "occurrence." Without an **[*383]** occurrence giving rise to initial coverage, the endorsement is meaningless.

In light of the foregoing, we do not believe that reversal is warranted for any of the reasons asserted by Vector.

VI

Vector's final argument is that the exception **[***19]** to exclusion (a), when read together with exclusions (n) and (o), creates an ambiguity in the insurance contract which must be construed in favor of coverage. Again, we disagree with Vector's argument.

The exclusions at issue provide:

> This insurance does not apply:
>
> (a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's

> products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;
> * * *
> (n) to property damage to the named insured's products arising out of such products or any part of such products;
> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith . . . .

In *Stillwater Condominium Ass'n v American Home Assurance Co, 508 F Supp 1075 (D Mont, 1981)*, aff'd *688 F2d 848 (CA 9, 1982)*, cert den *460 U.S. 1038; 103 S Ct 1429; 75 L Ed 2d 789 (1983)*, **[***20]** the United States District Court for the district of **[*384]** Montana addressed the exact issue now before us. In resolving this issue, the court emphasized that exclusionary clauses limit the scope of coverage provided under the insurance contract; they do not grant coverage. *Id. at 1079*. Moreover, the court pointed out that each individual exclusion refers, not to the other exclusions, but to the hazards insured against *by the insurance contract*. Accordingly, "exclusions are to be read 'with the insuring agreement, independently of every other exclusion.'" *Id.*, quoting *Weedo v Stone-E-Brick, Inc, 81 NJ 233, 248; 405 A2d 788 (1979)*. The court then stated:

> Further, the *Weedo* analysis is consistent with the all-risk nature of the CGL policy. To reiterate, the facts alleged in the *Stillwater* action are within the coverage of the insuring agreement standing alone. The exception to exclusion (a) preserves that coverage and brings it back within the broad all-risk coverage of the insuring agreement. Exclusions (l) and (m), the business risk or work product exclusions, however, remove the occurrences **[***21]** of the *Stillwater* action from the coverage granted by the insuring provision. The occurrences of the *Stillwater* action are not covered because the condominiums which are the basis of the damage are "the named insured's products" (exclusion [l]), and "work performed by or on behalf of the named insured" (exclusion [m]).
> * * *
>
> Plaintiff, however, urges the following analysis. The exception to exclusion (a) "grants" coverage for the occurrences of the *Stillwater* action. Exclusions (l) and (m) (the business risk exclusions) take away, or are in juxtaposition with, the coverage "granted" in the exception to exclusion (a). Therefore ambiguity arises and coverage results. *See, e.g. Commercial Union Assur Companies v Gollan, [*385] [118 NH 744] 394 A2d 839, 842 (1978)*. This analysis, however, is inapposite because the coverage supposedly "granted" by the exception to exclusion (a) has already been granted in the insuring provision. Having been granted in the insuring provision, that coverage is subject to the limitation of each and every exclusion. [*Id.*]

Therefore, the court concluded that no ambiguity was created **[***22]** by the three exclusions. *Id. at 1079-1080*.

[337]** We find the logic of *Stillwater* persuasive. Therefore, we conclude that the exclusions are not to be read cumulatively, but individually. Doing so, we conclude that each, standing alone, is clear and unambiguous. Exclusion (a) and the exception contained therein do not create coverage. Moreover, a reasonable and practical construction of the exclusions reveals that they apply as found by the trial court. The trial court properly granted summary disposition. But see *Fresard v Michigan Millers Mutual Ins Co, 97 Mich App 584; 296 NW2d 112 (1980)*, aff'd by an equally divided *Court 414 Mich 686 (1982)*, reh den *417 Mich 1103 (1983)*. [1]

VII

For all these reasons **[***23]** we conclude that the insurance contract in question does not extend coverage to Vector on the circumstances of this case. Accordingly, the trial court properly granted summary disposition in favor of Hawkeye.

Affirmed.

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[1] The panel in *Fresard* adopted the minority view. See *St Paul Surplus Lines Ins Co v Diversified Athletic Services, 707 F Supp 1506, 1510 (ND Ill, 1989)*.

EXHIBIT 3

Henderson v. State Farm Fire & Cas. Co.

Supreme Court of Michigan

March 10, 1999, Argued ; July 8, 1999, Decided ; July 8, 1999, Filed

No. 110822

Reporter
460 Mich. 348 *; 596 N.W.2d 190 **; 1999 Mich. LEXIS 1870 ***

DANIEL HENDERSON, Assignee of DAWN MYSIEROWICZ, Plaintiff-Appellee, v STATE FARM FIRE AND CASUALTY COMPANY, an Illinois Insurance Corporation, Defendant-Appellant.

Prior History: **[***1]** *Macomb Circuit Court, Mary A. Chrzanowski, J. Court of Appeals, MARKEY, P.J., and JANSEN and WHITE, JJ. 225 Mich. App. 703 (1997)* (Docket No. 188579).

Disposition: Reversed and remanded for further proceedings.

Counsel: Sarvis & Herrmann, P.C. (by J. Steven Sarvis) Bingham Farms, MI, for plaintiff-appellee.

Draugelis & Ashton, L.L.P. (by Floyd C. Virant) Plymouth, MI, for defendant-appellant.

Amici Curiae:

Charters, Heck, O'Donnell, Petrulis & Zorza, P.C. (by Eric S. Goldstein) Troy, MI, for Michigan Trial Lawyers Association.,

Dykema, Gossett, P.L.L.C. (by Lori M. Silsbury) Lansing, MI, for Insurance Information Association of Michigan.

EXHIBIT 3

Judges: Chief Justice Elizabeth A. Weaver, Justices James H. Brickley, Mich.ael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., WEAVER, C.J., and BRICKLEY, CORRIGAN, and YOUNG, JJ., concurred with TAYLOR, J., KELLY, J. (dissenting). CAVANAGH, J., concurred with KELLY, J.

Opinion by: TAYLOR

Opinion

[*350] **[**192]** Opinion

BEFORE THE ENTIRE BENCH

TAYLOR, J.

We granted leave to appeal in this case to review the Court of Appeals first impression construction of the phrase "in **[***2]** the care of" in a homeowner's insurance policy. The Court of Appeals determined that the phrase was ambiguous and that there was no genuine issue of material fact that Dawn Mysierowicz, plaintiff's assignor, came within the definition of an insured [1] under defendant's insurance policy because she was "in the care of" the named insured. We find that the Court of Appeals erred in reaching this holding. Because we conclude that neither plaintiff nor defendant was entitled to summary disposition, we reverse and

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[1] The insurance policy contained the following definition of the word "insured":

4. "insured" means you and, if residents of your household: a. your relatives; and b. any other person under the age of 21 who is *in the care of* a person described above. [Emphasis added.]

remand to the trial court for further proceedings.

Background Facts and Proceedings Below

In early 1993, Mysierowicz's mother was in the process of divorcing her father and was unable to provide a home for her. Bonnie Twitchell, **[***3]** the mother of Mysierowicz's boyfriend Travis Twitchell, agreed that Mysierowicz could stay at the Twitchell home on a **[*351]** temporary basis. [2] On June 19, 1993, plaintiff Daniel Henderson was visiting the Twitchell household. An altercation occurred with some strangers in front of the Twitchell home during which plaintiff was stabbed. Henderson subsequently filed a lawsuit alleging that Travis Twitchell and Mysierowicz had negligently provoked the strangers, resulting in his being injured.

The lawsuit was tendered to State Farm Fire and Casualty Company. State Farm assumed a defense for Travis Twitchell, but declined to provide a defense for Mysierowicz on the basis that she was not an "insured" within the meaning of the insurance policy. Plaintiff obtained a default judgment for $ 75,000 against Mysierowicz. In consideration of a promise by Henderson not to proceed against her personal assets, Mysierowicz assigned all rights, **[***4]** benefits and claims she had against State Farm to Henderson.

Henderson subsequently filed a complaint, as Mysierowicz's assignee, against State Farm alleging that it had breached its obligations when it did not defend and provide coverage to Mysierowicz under the Twitchell homeowner's policy. Plaintiff alleged that he was entitled to a judgment of $ 75,000 against defendant. State Farm filed an answer denying liability on the basis that Mysierowicz was not an "insured" as the term was defined in the insurance policy. After depositions of Mysierowicz and the Twitchells were taken, plaintiff filed a motion for summary disposition under MCR 2.116(C)(9) (failure to state a **[*352]** valid defense) and MCR 2.116(C)(10) (no genuine **[**193]** issue of material fact). Plaintiff argued on the basis of deposition testimony that he filed with his motion that Mysierowicz fit within the definition of an "insured" in the insurance policy. Defendant responded by filing its own motion for summary disposition under MCR 2.116(C)(10). Defendant also cited and provided deposition testimony it said demonstrated that Mysierowicz was not an "insured" and that it had properly refused to defend or provide **[***5]** coverage in the earlier lawsuit.

The trial court denied plaintiff's motion andgranted defendant's motion. The court explained:

This Court finds that Dawn Mysierowicz was at the age of 18, [a] legal adult suffering from no physical or mental disabilities. She resided with the Twitchells and was not under their control, guidance, supervision, management or custody. As such it is clear to this Court that State Farm's policy of insurance did not provide coverage to her because she was not, "In the care of," the insureds. Thus, this Court finds no genuine issue as to any material fact.

Plaintiff filed a claim of appeal. After consulting dictionary definitions of the word "care" and some out of state cases, the Court of Appeals determined that "care" had many meanings and thus the phrase "in the care of" was ambiguous because it could also reasonably be understood to have different meanings. The Court ultimately reversed the order granting summary disposition for defendant and further found that there was no genuine issue of material fact that Mysierowicz came within the definition of "insured" because she was "in the care of" Bonnie Twitchell, the named insured under defendant's homeowner's **[***6]** policy. 225 Mich. App. 703; 572 N.W.2d 216 (1997). We **[*353]** subsequently granteddefendant's application for leave to appeal. *Henderson v State Farm Fire & Casualty Co., 459 Mich. 878, 586 N.W.2d 744 (1998).*

Standard of Review

We review the grant or denial of a motion for summary disposition de novo. Groncki v Detroit Edison Co. 453 Mich. 644, 649; 557 N.W.2d 289 (1996). Further, the construction and interpretation of an insurance contract is a question of law for a court to determine that this Court likewise reviews de novo. Morley v Automobile Club of Michigan, 458 Mich. 459, 465; 581 N.W.2d 237 (1998). Whether contract language is ambiguous is also a question of law which we review *de novo*. **[***7]** Port Huron Ed Ass'n v Port Huron Area School Dist, 452 Mich. 309, 323; 550 N.W.2d 228 (1996). It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). Moll v Abbott Laboratories, 444 Mich. 1, 28, n 36; 506 N.W.2d 816 (1993). Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists. *Id.*

[2] Travis Twitchell was twenty years old and Mysierowicz was eighteen years old.

Principles Utilized in Interpreting InsuranceContracts

Initially, in reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction. **[*354]** *Arco Industries Corp v American Motorists Ins Co, 448 Mich. 395, 402; 531 N.W.2d 168 (1995)*.

First, **[***8]** an insurance contract must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co, 438 Mich. 197, 207; 476 N.W.2d 392 (1991)*. A court must not hold an insurance company liable for a risk that it did not assume. *Auto-Owners Ins Co v Churchman, 440 Mich. 560, 567; 489 N.W.2d 431 (1992)*. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. *Id.* Thus, the terms of a contract must be enforced as written where there is no ambiguity. *Stine v Continental Casualty [**194] Co, 419 Mich. 89, 114; 349 N.W.2d 127 (1984)*.

While we construe the contract in favor of the insured if an ambiguity **[***9]** is found, *Auto Club Ins Ass'n v DeLaGarza, 433 Mich. 208, 214; 444 N.W.2d 803 (1989)*, this does not mean that the plain meaning of a word or phrase should be perverted, or that a wordor phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured. *Upjohn Co, supra at 208, n 8*. The fact that a policy does not define a relevant term does not render the policy ambiguous. *Auto Club Group Ins Co v Marzonie, 447 Mich. 624, 631; 527 N.W.2d 760 (1994)*. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins Co of Michigan v Czopek, 440 Mich. 590, 596; 489 N.W.2d 444 (1992)*. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism. *Upjohn Co, supra at 209, n 8*.

[*355] Analysis

The Court of Appeals erred in **[***10]** concluding that the phrase "in **the care of" was ambiguous. It is not.** [3]

The Court of Appeals failed to recognize that this phrase is a colloquial or idiomatic phrase that is peculiar to itself and readily understood as a phrase by speakers and readers of our language. [4]

[*11] An example of a court recognizing that parsing phrases word by word may lead to an inaccurate interpretation is informative. In *Nat'l Security Archive v United States Dep't of Defense, 279 U.S. App. D.C. 308, 310*; *880 F.2d 1381 (1989)*, the United States Court of Appeals for the District of Columbia, in analyzing the phrase "educational institution," stated:**

It is often the case that words, used in conjunction, convey a meaning different from that which they would bear if interpreted separately.[5]

[*356] Utilization of plain English in insurance policies and other legal instruments has been on occasion required, but in all cases encouraged, in recent years. [6] This change requires courts to utilize less rigid methods of interpretation than the **[***12]**

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[3] We reject Justice Kelly's claim that the phrase is ambiguous because both parties attach materially different meanings to the phrase and advocate different applications of the phrase. The fact that each party is advocating a definition that supports its desired outcome in a case of first impression does not make a phrase ambiguous. If this were the test, all terms and phrases would be rendered ambiguous.

[4] The major flaw in the Court of Appeals approach, as will be discussed below, was failing to deal with the disputed phrase as a phrase.

Furthermore, even when one engages in a word-by-word analysis, such as the Court of Appeals did here, the mere fact that various dictionaries define the word "care" differently does not make the word "care" ambiguous. To so hold would make virtually any word ambiguous, thus derailing proper interpretation where word by word explication is called for. See our discussion of the proper understanding of the word "of" in *Horace v City of Pontiac, 456 Mich. 744, 755-756*; *575 N.W.2d 762 (1998)*.

[5] To nail down the point, the court wryly gave the phrase "monkey business" as an example of a phrase that had a different meaning than the sum of its constituent parts. *279 U.S. App. D.C. at 310-311, n 4*.

[6] The Legislature since 1990 has required basic insurance policies to be written in plain English. *MCL 500.2236*;

old densely written policies demand. [7] **[**195]** With this in mind, **when faced with plain English phrases in an insurance contract,** any attempt to **define** each element, or word, of the phrase, as the Court of Appeals did, will almost invariably result in an inaccurate understanding of the phrase. Rather, the proper approach is to read the phrase as a whole, giving the phrase its commonly used meaning. *Group Ins Co v Czopek, supra at 596*. This requires a court to give contextual meaning to the phrase to determine what the phrase conveys to those familiarwith our language and its contemporary usage. This approach is consistent with the parallel **rule for statutory construction, which requires** that all nontechnical words and phrases be defined according to the common and approved usage of the language. *MCL 8.3a*; MSA 2.212(1). Thus, when **[***13]** the meaning of a colloquial phrase is in dispute, the court **[*357]** must not mechanistically parse the meaning of each word in the phrase; instead, it must look to the contextual understanding and consider the phrase as a whole.

[*14]** The tools available to a court in seeking to establish the meaning of such phrases include common understandings of which the court can take notice, as well as other sources such as specialized dictionaries [8] or publications. [9] Furthermore, it must not be forgotten that the goal of the court in this endeavor is to construe the phrase so as to preserve the parties' agreement.

While the meaning of the phrase "in the care **[***15]** of" is not ambiguous, [10] this is not to say that application of the phrase to a given set of facts will always be easy. This is the case here. While the facts are not in dispute here, reasonable persons could disagree about the conclusions to which they lead. Said another way, individual factfinders could reasonably give different weight to the same facts, causing them to reach opposite conclusions regarding whether Mysierowicz was "in the care of" Mrs. Twitchell at the time of the stabbing. **[*358]** Thus, it was improper to grant summary disposition to either party in this case.

The GeneralMeaning **[***16]** of the Phrase

Given that the contract does not define the phrase "in the care of," and because interpretation of an insurance contract is a question of law, it falls to us to provide some guidance regarding the meaning of the phrase. In our view, the following nonexclusive common-sense factors are relevant for the factfinder to consider in answering when someone is "in the care of" someone else:

(1) is there a legal responsibility to care for the person;

(2) is there some form of dependency;

(3) is there a supervisory or disciplinary responsibility;

(4) is the person providing the care providing substantial essential financial support;

[196]** (5) is the living arrangement temporary or permanent, including how long it has been in existence and is expected to continue;

(6) what is the age of the person alleged to be "in the care of" another (generally, the younger a person the more likely they are to be "in the care" of another);

(7) what is the physical or mental health status **[***17]** of the person alleged to be "in the care of" another (a

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MSA 24.12236. The legal profession has also taken a strong interest in having documents written in plain English. For example, the Michigan Bar Journal regularly publishes articles encouraging, and even giving awards regarding, the use of plain English in contracts, pleadings, and the like. Indeed, the Plain English Committee even has its own web site. See *www.michbar.org/committees/penglish/pengcom.html*.

[7] **As stated in 2 Couch, Insurance, 3d, § 21:5, p 21-9:The trend in the insurance industry is toward drafting policies using "plain English." As a result, many of the words and phrases that have created difficulty in interpretation and have required judicial intervention have been deleted or redefined, leaving the courts with new words and phrases to interpret.**

[8] **For example, a glossary of idiomatic expressions could in a given case help one understand such sports metaphors as: (1) a "hail Mary pass," (2) a "hat trick," (3) "down for the count," or (4) even the venerable "home run."**

[9] **For example, if a legal phrase of art such as "equitable remedies" is found in a contract, the phrase would be interpreted in accord with common law understandings and case law explanations that those familiar with such terms of art are held to understand.**

[10] See, e.g., *Horace Mann Ins v Stark, 987 F. Supp. 562, 567 (WD Mich., 1997)* (a "term is not rendered ambiguous merely because its meaning may vary according to the circumstances"); *Grediq v Tennessee Farmers Mutual Ins Co, 891 S.W.2d 909, 914 (Tenn App, 1994)* **("the fact that words may be difficult to apply to a given factual situation does not make those words ambiguous").**

person with health problems is more likely to be "in the care" of another); and

(8) is the person allegedly "in the care of" another gainfullyemployed (a person so employed is less likely to be truly dependent on another)?

[*359] Facts of Record Suggesting Mysierowicz Was "in the care" of Bonnie Twitchell

The Court of Appeals relied on deposition testimony establishing the following in concluding there was no genuine issue of material fact that Mysierowicz was "in the care of" Bonnie Twitchell: (1) Mysierowicz paid no rent and contributed nothing in terms of the monthly mortgage payments, property taxes and utilities; (2) Mrs. Twitchell performed all household chores including meals when she was home; (3) Travis hoped that everyone regarded Mysierowicz as a member of the family and considered the three of them to be living as one family unit; [11] **[***18]** (4) Mrs. Twitchell had assumed responsibility for Mysierowicz's well-being; [12] (5) Mysierowicz was primarily dependent on Mrs. Twitchell for food and shelter; [13] and (6) Mrs. Twitchell provided virtually total [14] financial support for Mysierowicz.

Facts of Record Suggesting Mysierowicz Was Not "In the Care" of Bonnie Twitchell

The Court of Appeals reached its conclusion that there was no genuine issue of material fact that Mysierowicz was "in the care of" Mrs. Twitchell, while acknowledging: (1) Mysierowicz was eighteen years old; (2) the living arrangement was temporary; **[*360]** (3) Mysierowicz was responsible for purchasing all her personal items, including toiletries and clothing and maintaining the car her parents had purchased for her; (4) Mysierowicz had a telephone in her own name in the Twitchell house; (5) Mysierowicz agreed to contribute $ 20 a week toward an average weekly grocery bill of $ 50; (6) neither Bonnie nor Travis Twitchell exercised **[***19]** any control over Mysierowicz's activities; (7) Mrs. Twitchell did not sign an agreement totake care of Mysierowicz nor did she consider herself responsible for Mysierowicz; and (8) Mysierowicz was free to come and go as she pleased, while providing for some of her own support.

Those factors cited by the Court of Appeals in support of its ruling, which are supported by the record, would allow a reasonable factfinder to conclude that Mysierowicz was "in the care of" **[*361]** Mrs. Twitchell at the time Henderson was stabbed. However, the eight other factors cited immediately above would similarly allow a reasonable factfinder to conclude that Mysierowicz was not "in the care of" Mrs. Twitchell at the time of the stabbing. [15]

[*20]** **[**197]** In our judgment, both the trial court and the Court of Appeals erred. The trial court should not have granted summary disposition to defendant because therewas deposition testimony from which a reasonable person could conclude that Mysierowicz was "in the care of" Mrs. Twitchell at the time of the stabbing. The Court of Appeals likewise erred in concluding as a matter of law that Mysierowicz was "in the care of" Mrs. Twitchell at the time of the incident, because there was evidence from which a reasonable person could conclude that she was not. [16]

Conclusion

Each side cited deposition testimony supporting its position. Viewing all the facts in the light most favorable to plaintiff forecloses a ruling, as a matter of law, that Mysierowicz was not "in the care of" Mrs. Twitchell. Similarly, viewing all the facts in a light most favorable to defendant forecloses a ruling **[***21]** as a matter of law that Mysierowicz was "in the care of" Mrs. Twitchell. We are satisfied that a question of fact clearly exists in this case that can only be resolvedby a trier of fact. Neither party is entitled to judgment as a matter of law under *MCR 2.116(C)(10)*.

Reversed and remanded for further proceedings.

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[11] Contrary to the dissent, Travis Twitchell's subjective hope is not evidence that Mysierowicz was "in the care of" Mrs. Twitchell.

[12] However, Mrs. Twitchell denied being responsible for Mysierowicz "in any way."

[13] Mysierowicz testified that she was not capable of completely supporting herself without assistance.

[14] However, Mysierowicz was working full-time and paid the majority of her own living expenses. Hence, the record does not corroborate the dissent's reference to this unsupported assertion.

[15] **It is axiomatic that the trial court must give the benefit of all reasonable doubt to the nonmoving party when considering the motion.** *SSC v Detroit Gen'l Retirement System, 192 Mich. App. 360, 364*; *480 N.W.2d 275 (1991)*.

[16] None of the out of state cases cited by the dissent persuade us that plaintiff is entitled to judgment as a matter of law.

WEAVER, C.J., and BRICKLEY, CORRIGAN, and YOUNG, JJ., concurred with TAYLOR, J.

Dissent by: KELLY

Dissent

KELLY, J. (*dissenting*).

I respectfully dissent from the majority's holding that the phrase "in the care of" is unambiguous. I dissent, also, from the remand for a jury determination of whether Dawn Mysierowicz was "in the care of" Mrs. Twitchell.

I would hold that the phrase is ambiguous, and as such, the contract provision should be construed against the defendant, as its drafter. Plaintiff is entitled to judgment as a matter of law under MCR 2.116(C)(10) because there was no genuine issue of **[*362]** material fact, given this Court's de novo standard of review.

We review both the grant or denial of a motion for summary disposition and the interpretation of an insurance contract de novo. Groncki v Detroit Edison Co, 453 Mich. 644, 649; 557 N.W.2d 289 (1996); **[***22]** Morley v Automobile Club of Michigan, 458 Mich. 459, 465; 581 N.W.2d 237 (1998). Under Michigan law, general contract rules are followed when construing insurance contracts. Auto-Owners Ins Co v Harrington, 455 Mich. 377; 565 N.W.2d 839 (1997). Whether the language is ambiguous is a question of law, which is likewise reviewed de novo. Port Huron Ed Ass'n v Port Huron Area School Dist, 452 Mich. 309, 323; 550 N.W.2d 228 (1996). In construing insurance contracts, any ambiguities are strictly construed against the insurer, to maximize coverage. American Bumper & Mfg Co v Hartford Fire Ins Co, 452 Mich. 440; 550 N.W.2d 475 (1996).

Concomitant to the rules of construction is the rule of reasonable expectation. It states that a court examines whether a policyholder was led to a reasonable expectation of coverage for the loss in question upon reading the contract. Vanguard Ins Co v Clarke, 438 Mich. 463 at 472, 475 N.W.2d 48 (1991). If so, coverage will be afforded. Fire Ins Exchange v Diehl, 450 Mich. 678, 687; 545 N.W.2d 602 (1996). **[***23]**

In this case of first impression, the majority concludes that the phrase "in the care of" is unambiguous. The phrase is ambiguous, not because various dictionaries define the word "care" differently, but because both parties attached materially different meanings to the phrase. See Allstate Ins Co v Fick, 226 Mich. App. 197; 572 N.W.2d 265 (1997). See also **[*363]** Seaboard Surety Co v Bachinger, 313 Mich. 174; 20 N.W.2d 854 (1945). I disagree **[**198]** with the majority's statement in footnote 3. Slip op at 7. In this case, the parties advocate completely distinct constructions of the phrase, "in the care of." It is not a matter of ambiguity being asserted on the sole basis that each party offers a different definition for the purpose of supporting his desired outcome. If ambiguity could be grounded alone on differing definitions, then, as the majority suggests, any term would be ambiguous. What distinguishes this case is that, here, each party's construction is equally plausible. When the language of a contract is subject to two or more reasonable interpretations, then the contract is ambiguous. Petovello v Murray, 139 Mich. App. 639; [***24] 362 N.W.2d 857 (1984).

The words in an insurance policy are generally considered to be ambiguous when they may be reasonably understood in different ways. 226 Mich. App. at 203. The defendant advocates a narrow construction, that is, the phrase should be construed to mean "legal care," such as a nurse would render to a patient. The plaintiff construes the phrase much more broadly and wouldnot limit its definition to such a narrow construction.

The majority states that "in the care of" was misinterpreted by the Court of Appeals because it was parsed, rather than being treated as an idiom or colloquialism. "In the care of" is not a colloquial or idiomatic phrase. It cannot be analogized to a phrase like "monkey business." There is only one noun used in the expression "in the care of," whereas, in "monkey business," two nouns used together obliterate the meaning of each and form a whole new meaning. **[*364]** When interpreting "in the care of," the proper focus is on the parties' intent. This is reviewed on an objective basis. See Allstate Ins Co v Keillor (After Remand), 450 Mich. 412, 417; 537 N.W.2d 589 (1995). Materiality **[***25]** connotes objective reasonableness. See Rowe v Montgomery Ward & Co, Inc, 437 Mich. 627; 473 N.W.2d 268 (1991). The cardinal rule in interpreting contracts is to effectuate the intent of the parties. Terry Barr Sales Agency, Inc v All-Lock Co, Inc, 96 F.3d 174 (CA 6, 1996); Rasheed v Chrysler Corp, 445 Mich. 109; 517 N.W.2d 19 (1994). Therefore, a reviewing court must necessarily examine the intent of the parties and the meanings attached by each onan

objective basis when construing a contract term.

I agree, as the majority recites, that a term is not rendered ambiguous merely because its meaning varies with changed circumstances. Also, a term is not ambiguous because it is difficult to apply to certain factual situations. However, in either instance, the likelihood of ambiguity is greatly enhanced.

A fair reading of some insurance policy language leads one to understand that there is coverage under a particular set of circumstances. Another fair reading of the same language may lead another to understand that there is no coverage. Under those circumstances, the contract is ambiguous and should be construed **[***26]** against the drafter in favor of coverage. Michigan *Mut Ins Co v Dowell, 204 Mich. App. 81; 514 N.W.2d 185 (1994)*, lv den *447 Mich. 971 (1994)*.

In this case, defendant reads "in the care of" to connote only support, supervision, charge, custody, and responsibility. Courts in other jurisdictions have interpreted the phrase "in the care of" as used in homeowners' insurance policies more broadly. Both **[*365]** plaintiff and defendant here have relied on *State Farm Fire & Casualty Co v Odom*, [1] a case involving a State Farm policycontaining language almost identical to the instant policy. [2]

[199]** In *Odom*, the Sixth Circuit Court of Appeals found that a **[***27]** child, who lived with her mother in the named insured's house, but was unrelated to the insured, was "in the care of" the insured. The court relied on the fact that the insured provided the child with significant physical care, giving her housing, clothing, and food, and sharing in her care. *Id. at 250*.

While the insured was looking after her, the child was fatally injured. The mother sued the insured for wrongful death. The Sixth Circuit agreed with State Farm that (1) the child was an "insured" under the policy because she was "in the care of" the named insured, and (2) the policy excluded liability coverage forinjuries suffered by an insured. Accordingly, State Farm was not obligated under the policy to provide coverage or defense arising out of the insured's alleged liability for the child's injuries and death. *799 F.2d at 249-250*.

Notably, in *Odom*, State Farm sought to have the child deemed an "insured" under the policy because such a finding precluded coverage. In this case, State Farm seeks to prevent this Court from finding that Dawn Mysierowicz is an insured under Bonnie Twitchell's policy.

[*366] The irony apparent here was commented **[***28]** on by contracts scholar, Allan Farnsworth: "Sometimes the drafter may have foreseen the [ambiguity] but deliberately refrained from raising it---the lawyer who 'wakes these sleeping dogs' by insisting that it be resolved may cost the client the bargain". 2 Farnsworth, Contracts, § 7.8, p 243.

Also persuasive is the Louisiana Court of Appeals decision in *United States Fidelity & Guaranty Co v Richardson, 486 So. 2d 929, 930-931 (La App, 1986)*. There, the question whether the fourteen-year-old daughter of the insured's girlfriend living in the insured's home was "in the care of" the insured for purposes of coverage under the insured's homeowner'spolicy. The policy defined as insureds "residents of the named insured's household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of any insured." *Id. at 931*.

The court found that all three individuals lived together in the insured's house under an unwritten agreement for sharing expenses. The insured paid the mortgage, bought his food, and took care of his vehicle. The insured's girlfriend paid for utilities, telephone bills, her car, purchased food **[***29]** for her and her daughter, and occasionally contributed to the mortgage payment. *Id. at 930-931*. In concluding that the fourteen-year-old was "in the care of" the insured and was, therefore, an "insured" under the policy, the court observed:

It is clear that on the basis of the agreement between the parties, the payments made by James Richardson [the insured] did directly benefit Demetric Ayio. He was caring for the child by letting her stay in his home and by paying **[*367]** for both the maintenance of the home and his other agreed-upon expenses. Further, the bills and other expenses paid by James Richardson allowed Evelyn to devote more of her own income to Demetric's needs. Eventhough he did not consider himself as having guardianship of Demetric, James was much more than a nameless, unseen benefactor. We conclude, therefore, that the trial court was correct in its finding that the child was "in the care of" James

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[1] *799 F.2d 247 (CA 6, 1986)*.

[2] In *Odom*, supra at 249, the insurance contract defined the term "insured" as "you and the following residents of your household: a. your relatives; b. any other person under the age of 21 who is in the care of any person named above."

Richardson under the policy. [Id. at 931.]

Thus, the insured's homeowner's insurance company was required to provide insurance coverage for the girl and her mother when the girl injured her classmate. *Id.*

Similarly, **[***30]** in *Nationwide Mut Ins Co v Anderson*, [3] a woman and her eighteen-year-old son lived with the named insured in his home. The son was sued for wrongful death when a shotgun he held discharged **[**200]** and killed Kevin Anderson. Subsequently, the plaintiff, who had issued a homeowner's policy to the insured, sought a declaratory judgment to determine whether the son was an insured under the policy. 118 N.C. App. at 92. The policy defined "insured" as follows:

"insured" means you and residents of your household who are:

a. your relatives; or b. other persons under the age of 21 and in the care of any person named above. [Id. at 93.]

The lower court granted summary judgment for the plaintiff. *Id.* The North Carolina Court of Appeals found that the son was an insured under the policy. The named insured, the mother, and the son had acted as a family for many years, the son even referring **[*368]** **[***31]** to the insured as his stepfather. Id. at 95. The son, although eighteen when the incident occurred, remained dependent on the insured and his mother for the basic necessities of life, including food, clothing, and shelter. Id. at 94-95. Also, it was irrelevant that the son provided for his own support to some degree. The policy language did not contain a distinction based on whether the person "in the care of" the insured could support himself. *Id.*

Giving the phrase "in the care of" a nonstrained, nontechnical reading, and in light of the reasoning in cases that construed nearly identical provisions, I find that Dawn Mysierowicz was "in the care of" defendant's insured, Bonnie Twitchell. Therefore, she was an "insured" under defendant's homeowner's policy.

In accordance with established precedent, I would construe the phrase against defendant and in favor of plaintiff, as Mysierowicz' assignee. State Farm Mut Auto Ins Co v Enterprise Leasing Co, 452 Mich. 25; 549 N.W.2d 345 (1996). The phrase "under the care of" has been interpreted to mean "guidance, supervision, control, management or custody of another." Bruno v Hartford Accident & Indemnity Co, 337 So. 2d 241 [***32] (La App, 1976). However, *Odom*, *Richardson*, and *Anderson* support plaintiff's claim that the phrase is subject to broader meanings that include the provision of support to another. [4]

[*369] The majority opinion correctly states the applicable construction guidelines and this Court's standard of review. However, it ignores its proper role in construing the phrase in question and erroneously delegates that responsibility to the jury. [5] It lists eight "nonexclusive common-sense **[***33]** factors" [6] for which it provides no authority. [7] It then lists the undisputed facts and **[**201]** orders the jury to arrive at a legal conclusion.

[*34]** It is undisputed that Bonnie Twitchell permitted Mysierowicz to stay in her homewithout requiring

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[3] 118 N.C. App. 92; 453 S.E.2d 542 (1995).

[4] The Sixth Circuit Court of Appeals in *Odom*, 799 F.2d at 250, found that "in the care of" was unambiguous in the context of that case. However, it said that the phrase does not mean only "legal care" as opposed to "legal and physical care," where the named insured furnishes housing, clothing, food, and security for a household resident. In so concluding, *Odom* indicates that the phrase "in the care of" would be ambiguous if the question were whether the phrase meant "legal care" versus "physical care." *Id.*

[5] Assuming that the majority correctly concluded that the phrase was unambiguous, its construction and legal conclusion from uncontested facts was a question of law for the court to decide. Vigil v Badger Mut Ins Co, 363 Mich. 380; 109 N.W.2d 793 (1961); State Farm Fire & Cas Co v Couvier, 227 Mich. App. 271; 575 N.W.2d 331 (1998). See also Moll v Abbott Laboratories, 444 Mich. 1, 27-28; 506 N.W.2d 816 (1993).

> [A] court . . . does not have to remain idle in the presence of undisputed, uncontroverted facts. In this situation, the only question remaining is what legal conclusion can be drawn from the facts. This question is to be decided as a matter of law by the trial judge.

[6] Slip op at 11.

[7] The majority states that the "contract does not define the phrase 'in the care of.'" Slip op at 11. It also concludes that the phrase is unambiguous. Slip op at 7. Despite these assertions, the majority, in effect, provides the jury with a list of possible definitions from which to choose. In essence, it permits the jury to choose a meaning or interpretation without regard to the intent of either party. Basic contract law requires courts to honor the intent of the parties. Rasheed v Chrysler Corp, supra. Furthermore, the majority compiles extrinsic factors to

Mysierowicz to pay for either the maintenance of the home or substantial household expenses. Bonnie Twitchell, not Mysierowicz's mother, provided for Mysierowicz during the approximately six months **[*370]** that Mysierowicz spent in the Twitchell home. As in *Richardson, supra*, Bonnie Twitchell took care of nearly all household expenses, enabling Mysierowicz to spend more of her income on herself. Moreover, unlike a "nameless benefactor," Bonnie Twitchell provided Dawn Mysierowicz with food, shelter, and supplies without exercising control over her. Arguably, however, by doing so, she assumed responsibility for Mysierowicz' well-being in a larger measure.

As in *Anderson*, Mysierowicz provided her own support by purchasing her own clothing and personal articles and maintaining her vehicle. [8] However, as in *Anderson, supra*, she was primarily dependent upon Bonnie Twitchell to provide her with food and shelter. [9] Mysierowicz moved from her mother's home to Bonnie Twitchell's home and remained with the Twitchells when they moved into a hotel after their house **[***35]** was damaged by fire. She then returned to her mother's home when she left the Twitchells. She never livedby herself during this period. While residing in the Twitchell home, Mysierowicz was considered a member of the family, as in *Odom, supra*. Although not dispositive, this fact provides further support for the conclusion that she was "in the care of" Bonnie Twitchell.

Finally, as in *Anderson, supra*, Mysierowicz' age did not preclude her from being dependent on Bonnie **[*371]** Twitchell for the basic necessities, even though she provided some of her own support.

By construing the phrase "in the care of" in favor of **[***36]** coverage and applying the law to the essentially uncontested material facts, I find that Dawn Mysierowicz came within the definitionof an "insured" because she was "in the care of" Bonnie Twitchell, the named insured under defendant's homeowner's policy.

In conclusion, what the majority denominates an issue of fact is actually an issue of law that only a court should decide. Given that no genuine issue of material fact exists and given our rules of contract construction, plaintiff was entitled to judgment as a matter of law under *MCR 2.116(C)(10)*. Therefore, I would affirm the judgment of the Court of Appeals.

CAVANAGH, J., concurred with KELLY, J.

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help the jury in construing the contract. Courts cannot supply material provisions that are absent from a clear and unambiguous writing. *Purlo Corp v 3925 Woodward Ave, 341 Mich. 483; 67 N.W.2d 684 (1954)*; *Hy King Associates, Inc v Versatech Mfg Industries, Inc, 826 F. Supp. 231 (ED Mich., 1993)*. If the majority were correct in concluding that the phrase is unambiguous, then there would be no need for a jury to deal with it.

[8] Travis Twitchell, son of Bonnie Twitchell testified that he maintained Dawn's car by performing oil changes, tune-ups, and other activities.

[9] While ordinary house guests are arguably provided with food and shelter, Dawn was different in that she was not free to return to another home. Bonnie Twitchell's home was the only one Dawn had during the period in question.

EXHIBIT 4

JUIF v. STATE HWY. COMMR.

Supreme Court of Michigan

Submitted October 13, 1938. Calendar No. 40,165. ; Decided December 21, 1938.

Docket No. 91

Reporter
287 Mich. 35 *; 282 N.W. 892 **; 1938 Mich. LEXIS 746 ***

JUIF *v.* STATE HIGHWAY COMMISSIONER.

Syllabus

Appeal from Wayne; Campbell (Allan), J. Submitted October 13, 1938. (Docket No. 91, Calendar No. 40,165.) Decided December 21, 1938.

Ejectment by Andrew Juif, Jr., and others against Grover C. Dillman and Murray D. Van Wagoner, as former and present State Highway Commissioners, respectively, to secure possession of land and for damages. Judgment for defendants. Plaintiffs appeal. Affirmed.

Counsel: *Donald M. Dixon* and *Wayne Van Osdol,* for plaintiffs.

Raymond W. Starr, Attorney General, and *H. Attix Kinch,* Assistant Attorney **[***3]** General, for defendants.

Opinion by: CHANDLER, J.

Opinion

[*36] **[**892]** CHANDLER, J. Plaintiffs brought suit in ejectment claiming to be the owners of land located in the township of Dearborn, Wayne county, described as:

"The south 33 feet of lot No. 8 of the subdivision of the estate of Cyrus Howard, deceased, of lot No. 5 of the military reservation, according to the plat thereof made by A. H. Wilmarth, copy of which plat is recorded in **[**893]** the office of the register of deeds in Wayne county in liber 434 of deeds, on page 182, said strip of land lying next north of and adjacent to the highway known as Michigan avenue or the Chicago road and extending across the entire front of lot No. 8."

They are the sole heirs at law of Andrew Juif, Sr., who, prior to August 24, 1911, was the owner of an undivided two-thirds interest in the whole of said lot 8. On the date mentioned, Andrew Juif, Sr., and wife, together with the owners of the remaining **[*37]** one-third interest in said lot, conveyed the south 33 feet thereof to Frank W. Brooks, trustee. The strip thus conveyed was immediately north of and adjacent to the north line of Michigan avenue as then established. The **[***4]** deed to Brooks as trustee provided:

"And it is further understood and agreed that the said above described premises shall be used for railway purposes, only, and ceasing to be used for such purposes shall revert, to said first parties, their heirs or assigns."

On August 20, 1913, the widow and heirs of Nicholas Juif, deceased, conveyed their outstanding undivided one-third interest in said lot to Andrew Juif, Sr. This deed described the whole of lot 8. By warranty deeds dated October 11, 1913, and May 4, 1914, respectively, Andrew Juif, Sr., and wife, conveyed to Samuel Orr and Ida F. Orr, his wife, lot 8, the descriptions in said deeds including the south 33 feet thereof which had previously been conveyed to Brooks as trustee. By various mesne conveyances from Brooks as trustee, title to the 33-foot strip of land is claimed by Murray D. Van Wagoner, highway commissioner of the State of Michigan, as successor to Grover C. Dillman, his predecessor in office, who received a quitclaim deed thereof on August 27, 1930.

In 1929, the strip of land was abandoned as far as being used for railway purposes is concerned. Plaintiffs, heirs

EXHIBIT 4

at law of Andrew Juif, Sr., claim that upon **[***5]** cessation of such use, title to the land in dispute reverted by virtue of the provision contained in the deed to Brooks and that by operation of law is now vested in them.

It was stipulated that neither of the defendants claimed any interest in the property in any manner **[*38]** other than in an official capacity, and that although ejectment was a proper remedy, due to the fact that the 33-foot strip in question was practically covered by the pavement of Michigan avenue, such remedy was inadequate, and that therefore in the event of judgment for plaintiffs, condemnation proceedings would be instituted pursuant to the statutes applicable thereto.

The trial court, believing that the two deeds from Andrew Juif, Sr., and wife, to Samuel Orr and his wife, operated to extinguish any right of entry which Juif, Sr., or his heirs might have had upon breach of the condition subsequent contained in the deed to Brooks, trustee, entered judgment for defendants. Plaintiffs have appealed.

Plaintiffs seek no quarrel with the proposition that an attempted conveyance of land before breach of condition subsequent by the possessor of a possibility of reverter conveys nothing, and operates **[***6]** to extinguish the possibility of reverter, and recognize that such is the rule in this jurisdiction as reiterated in *Dolby v. State Highway Commissioner, 283 Mich. 609 (117 A.L.R. 538)*, and established by cases cited therein. In support of their claims, however, they first contend that this rule has never been applied, by this court at least, and should not be applied in the instant case where those seeking to recover possession are heirs of the party who created the reversionary interest. In other words, they submit that the possibility of reverter was not extinguished as to them, heirs of Andrew Juif, Sr., by the deeds of the latter to Orr and wife, although conceding that it was extinguished as to the ancestor through whom they claim.

To our mind, this argument may be disposed of with little discussion. If we agree that the deeds to the Orrs extinguished the possibility of reverter as the Andrew Juif, Sr., it is difficult to comprehend by **[*39]** what reason or authority, once having been extinguished, it could still be transferred to plaintiffs as heirs. Obviously, something nonexistent cannot be inherited. The point was decided adversely to plaintiffs in **[***7]** *Rice* v. *Railroad Co.,* 12 Allen (94 Mass.), 141, in which it was held that the possibility of reverter was extinguished even though the conveyance obtaining this result named as grantee an heir of the grantor who held the reversionary interest. More significant, however, is the fact that the court considered the rights of the plaintiff as *heir* as well as his rights as grantee under the deed, and said:

"The only doubt which has existed in our minds on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this **[**894]** action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished so that the original grantor had no right of entry for breach after his deed to the son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. This privity is essential **[***8]** to the right of the heir to enter. But if the original grantor alienes the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est hceres viventis;* and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had aliened in his lifetime. The right of entry is gone forever."

[*40] The next point raised by plaintiffs is based upon the argument that from the nature of the deed to the Orrs and from other surrounding circumstances, it is apparent that Andrew Juif, Sr., did not intend to include the 33-foot strip in the deeds to Orr and wife, and that no conveyance of the land having therefore been made, the possibility of reverter was not extinguished but passed to plaintiffs as heirs, who are possessed of a right of entry now that the condition subsequent has been breached.

It is not disputed that the combined descriptions contained in the two deeds to Samuel Orr and wife include the strip of land in its entirety without reservation or exception. But plaintiffs claim that because **[***9]** the deeds in question warranted the property "to be free from all incumbrances whatever," an intention to convey only such land as was unincumbered is evidenced. In other words, the argument seems to proceed on the theory that because an incumbrance existed by reason of the prior conveyance to Brooks, trustee, with a condition subsequent attached thereto, the grantor, with

knowledge thereof, would not subsequently warrant the land to be free from all incumbrances, and that because he undoubtedly did not intend the warranty to apply to the 33-foot parcel, it is evidence he did not intend to convey it. We must confess difficulty in comprehending this argument. The descriptions in the two deeds mentioned are unambiguous and include the disputed land, which had been previously conveyed by the grantor subject to a condition subsequent. Even if we should assume that Andrew Juif, Sr., did not intend his warranty against incumbrances to apply to that which was in fact incumbered, we fail to see how it could have any effect on the question as to the quantity of land conveyed or intended to have been conveyed. This question must be controlled **[*41]** by the descriptions to be found in **[***10]** the deeds which embrace the whole of lot 8, including the property in dispute.In the absence of ambiguity, it must be said that the grantor intended to convey that which he described.

Plaintiffs also submit that it is apparent that their ancestor did not intend to convey this strip of land to Mr. and Mrs. Orr because, they claim, the surrounding facts and circumstances can be considered in determining the intent of the grantor inasmuch as a latent ambiguity exists in the two descriptions.The trial court rejected the testimony offered as bearing upon the question of intent, and correctly so, because we fail to find that the descriptions in the two deeds are subject to any ambiguity, either latent or patent. Evidence aliunde is not admissible under these circumstances to determine the intent of the grantor, assuming his intent to have been other than that which is derived from inspection of the deeds as executed and delivered. 16 Am. Jur. Deeds, p. 673, § 412. As to what constitutes a latent ambiguity existing in a description contained in a deed, see 16 Am. Jur. Deeds, p. 674, § 414; *Detroit, G.H. & M.R. Co. v. Howland, 246 Mich. 318 (68 A.L.R. 1)*. The descriptions in **[***11]** the Orr deeds present no latent ambiguity. Each deed describes a part of lot 8, including the disputed strip of land. The descriptions contained therein can be laid upon the ground and are found to correspond to the boundary lines of the lot as it exists. It is not a case where the description to be found in the deed develops to be equally applicable to separate and distinct parcels of land. The mere fact that the descriptions include land that the grantor had previously conveyed and no longer owned does not create a latent ambiguity.

[*42] The evidence offered as bearing upon the intent of Andrew Juif, Sr., as to the quantity of land he desired to convey to Mr. **[**895]** and Mrs. Orr was properly rejected by the trial court.

Judgment affirmed, with costs.

BUTZEL, BUSHNELL, SHARPE, and NORTH, JJ., concurred with CHANDLER, J.

WIEST, C.J. I am constrained by former decisions to concur.

Dissent by: POTTER, J.; MCALLISTER, J.

Dissent

POTTER, J. (*dissenting*). I dissent from the opinion herein which reaffirms the rule of *Halpin v. Rural Agricultural School District, 224 Mich. 308*, and *Dolby v. State Highway Commissioner, 283 Mich. 609 (117 A.L.R. 538)*.

[*12]** There are three opinions in *Dolby* v. *State Highway Commissioner,* -- that of Mr. Justice BUSHNELL which reaffirms the principle of *Halpin* v. *Rural Agricultural School District* based upon the ancient common-law rule no longer in force here, -- a concurring opinion by Mr. Justice NORTH who collected and cited a number of cases from jurisdictions other than Michigan where there are no statutes in force similar to those in force here. I shall not review the authorities mentioned in the dissenting opinion.

By statutes in force here since 1846, estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy. 3 Comp. Laws 1929, § 12927 (Stat. Ann. § 26.7). An estate in expectancy is where the right to the possession is postponed to a future period. 3 Comp. Laws 1929, § 12928 (Stat. Ann. § 26.8). Estates in expectancy are divided into future estates and reversions. 3 Comp. Laws 1929, § 12929 (Stat. Ann. § 26.9). A reversion is the residue of an estate left **[*43]** in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. **[***13]** 3 Comp. Laws 1929, § 12932 (Stat. Ann. § 26.12). It is fatuous to contend the estate left in the grantor in this case was other than a reversion.

Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession.

3 Comp. Laws 1929, § 12955 (Stat. Ann. § 26.35). A reversion, being an expectant estate, is alienable in the same manner as an estate in possession. Conveyances of any estate or interest in lands may be made by deed (3 Comp. Laws 1929, § 13278 [Stat. Ann. § 26.521]), regardless of who may be in actual possession of the same. 3 Comp. Laws 1929, § 13283 (Stat. Ann. § 26.526).

I think we have followed the ancient and absurd rule of *Halpin* v. *Rural Agricultural School District* asserted in direct violation of the express language of applicable statutes long enough, and that we ought not to continue knowingly to subject this court to the derision of the bench and bar; that those cases should be overruled. For these reasons, I dissent from the opinion of the majority herein.

McALLISTER, J. (*dissenting*). I concur in reversal for the reasons given by Mr. Justice POTTER in his opinion in *Dolby v. State [***14] Highway Commissioner, 283 Mich. 609 (117 A.L.R. 538)*.

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EXHIBIT 5

Bd. of Trs. of the Policemen & Firemen Ret. Sys. v. City of Detroit

Court of Appeals of Michigan

November 15, 2005, Submitted ; February 28, 2006, Decided

No. 263144

Reporter
270 Mich. App. 74 *; 714 N.W.2d 658 **; 2006 Mich. App. LEXIS 517 ***

BOARD OF TRUSTEES OF THE POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT, Plaintiff-Appellant, v. CITY OF DETROIT, Defendant-Appellee.

Subsequent History: Appeal denied by *Policemen & Firemen Ret. Sys. v. City of Detroit, 722 N.W.2d 222; 2006 Mich. LEXIS 2160 (Mich., Oct. 18, 2006)*

Prior History: **[***1]** Wayne Circuit Court. LC No. 04-417061-CZ.

Disposition: Reversed.

Counsel: *Martens, Ice, Klass, Legghio & Israel, P.C.* (by *Christopher P. Legghio* and *Michael J. Bommarito*), for the plaintiff.

Bruce A. Campbell for the defendant.

Judges: Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

Opinion by: Henry William Saad

EXHIBIT 5

Opinion

[659]** **[*75]** SAAD, J.

Plaintiff, Board of Trustees of the Policemen and Firemen Retirement System of the City of Detroit (Board), appeals the trial court's grant of summary disposition to defendant, city of Detroit. We reverse.

I. FACTS AND PROCEDURAL HISTORY

The Board is responsible for the general administration, management, and operation of the Policemen and Firemen Retirement System, which provides retirement and death benefits to active and retired uniformed city employees, their families, and beneficiaries. According to the Board's complaint, the retirement system currently provides benefits to nearly 14,000 Detroit employees and retirees and has assets of approximately $ 3 billion. Several Detroit officials and employees sit on the Board, including the mayor or his representative, a city council member, the city treasurer, the police chief, the fire commissioner, three fire fighters, and three police officers.

Part of the Board's **[***2]** responsibilities is to ensure that the retirement system is properly funded. Accordingly, the Board, after consultation with an actuary, determines the amount of Detroit's annual pension contribution. The plan actuary calculates plan assets and liabilities to determine whether the plan is overfunded or underfunded. The annual contribution Detroit must make to the plan includes present service cost, plus a credit or additional payment depending on whether the plan is overfunded or underfunded.

The 2004 plan was underfunded and, therefore, one component of the pension contribution is the amount of **[*76]** time necessary for Detroit to meet the system's unfunded accrued liabilities. Logically, the amount of time permitted to satisfy the accrued liabilities, also

known as the amortization period, affects the amount Detroit is obligated to contribute to the plan each year. In March 2004, the Board, by a six-to-five vote, adopted a 14-year amortization period to calculate Detroit's annual contribution to finance the unfunded accrued pension liabilities. However, Detroit maintained that a 20-year amortization period should apply under a local ordinance, notwithstanding that Detroit never followed **[***3]** the ordinance in the past and the Board had set the amortization period for many years. [1]

[*4]** **[**660]** On June 4, 2004, the Board filed a complaint against Detroit and sought a declaratory judgment "that it has the right to determine the time period for the financing of unfunded accrued pension liabilities." Thereafter, the Board filed a motion for summary disposition under MCR 2.116(C)(10) and argued that, under Michigan law, the Board has the authority to determine the **[*77]** amortization period and that Detroit must abide by its recommendation and pay the amount of pension contribution calculated by the Board. Detroit responded and argued that a Detroit ordinance controls the issue and that it permits the city to use a 20-year amortization period. Accordingly, Detroit asked the trial court to grant it summary disposition under MCR 2.116(I)(2). After oral argument, the trial court issued a written opinion and order that granted summary disposition to Detroit under MCR 2.116(I)(2). For the reasons articulated below, we reverse the trial court's decision and hold that the Board has the authority to set the amortization period.

II. STANDARD OF REVIEW AND APPLICABLE LAW

This Court reviews de novo a trial court's decision on a motion for summary **[***5]** disposition. Scott v Farmers Ins Exch, 266 Mich. App. 557, 560; 702 N.W.2d 681 (2005). As our Supreme Court recently reiterated in Nastal v Henderson & Assoc Investigations, Inc, 471 Mich. 712, 721; 691 N.W.2d 1 (2005):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Maiden v Rozwood, 461 Mich. 109, 120; 597 N.W.2d 817 (1999). The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Maiden, supra at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the **[*78]** moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). Quinto v Cross & Peters Co, 451 Mich. 358; 547 N.W.2d 314 (1996).

"The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that **[***6]** the opposing party, rather than the moving party, is entitled to judgment as a matter of law." Washburn v Michailoff, 240 Mich. App. 669, 672; 613 N.W.2d 405 (2000).

This case also requires the interpretation of a statute and a city ordinance. "This Court . . . reviews questions of statutory interpretation de novo." Local Area Watch v Grand Rapids, 262 Mich. App. 136, 142; 683 N.W.2d 745 (2004). This Court also reviews "a lower court's interpretation of the meaning of an ordinance de novo." Warren's Station, Inc v City of Bronson, 241 Mich. App. 384, 388; 615 N.W.2d 769 (2000).

Const 1963, Art 9, § 24 provides that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." The Board relies on MCL 38.1140m to argue that the Legislature conferred on it the power to determine the amortization period to finance unfunded accrued pension liabilities. The statute provides:

> *The governing board vested with the general* **[***7]**

[1] The record also reflects that, until now, Detroit has not followed or relied on the ordinance to limit its financing to a 20-year amortization period. The Board attached to its motion for summary disposition the affidavit of board member Walter Stampor, who stated that, since 1976, the Board has adopted the amortization periods for Detroit. According to Stampor's statement and accompanying chart of amortization rates, the Board adopted a 25-year amortization period in 1992 which descended one year in each subsequent year. Accordingly, by 2003, the amortization period as adopted by the Board was 14 years. Stampor further stated that, until 2003, Detroit did not object to, and regularly complied with the Board's descending amortization periods. As explained here, had Detroit enforced City Code § 54-2-6, the amortization period would have been 20 years throughout that period. Other than a copy of MCL 38.1140m, Detroit did not attach any other evidence to its response to the Board's motion for summary disposition. Accordingly, the evidence clearly indicates that Detroit at least acquiesced to the Board's decreasing amortization period recommendations from 1992 to 2002.

administration, management, and operation of a system or other decision-making ***[**661]*** *body that is responsible for implementation and supervision of any system shall confirm in the annual actuarial valuation and the summary annual report required under section 20h(2)* [2] *that each plan under this* ***[*79]*** *act provides for the payment of the required employer contribution as provided in this section and shall confirm in the summary annual report that the system has received the required employer contribution for the year covered in the summary annual report.* The required employer contribution is the actuarially determined contribution amount. An annual required employer contribution in a plan under this act shall consist of a current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability. For fiscal years that begin before January 1, 2006, the required employer contribution shall not be determined using an amortization period greater than 40 years. For years that begin after December 31, 2005, the required employer contribution shall not **[***8]** be determined using an amortization period greater than 30 years. In a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability. A required employer contribution for a plan administered under this act shall allocate the actuarial present value of future plan benefits between the current service costs to be paid in the future and the actuarial accrued liability. *The governing board vested with the general administration, management, and operation of a system or other decision-making body of a system shall act upon the recommendation of an actuary and the board and the actuary shall take into account the standards of practice of the actuarial standards board of the American academy of actuaries in making the determination of the required employer contribution.* [MCL 38.1140m (emphasis added).]

[*9]**

[*80] At issue on appeal is whether the above statute conflicts with City Code § 54-2-6(c), which provides:

> The City's annual contribution, expressed as a percent of active member compensations, to finance any unfunded accrued service pension liabilities shall be determined by dividing such unfunded accrued service pension liabilities by one percent of the present value of future compensations payable during the period of future years. Such period of future years shall be thirty years for actuarial valuation as of June 30, 1974, decreasing one year at each subsequent June 30 until a twenty year period is reached, which twenty year period shall then be used in each subsequent actuarial valuation.

III. ANALYSIS

As noted, the Board maintains that the trial court erred because, under MCL 38.1140m, **[**662]** the Board has the authority to adopt the amortization period to finance unfunded accrued pension liabilities. In contrast, Detroit argues that MCL 38.1140m merely places caps on the amortization periods starting in 2006, but that "it does not give the Board the right to decide on the amortization period." We disagree.

The statute provides that the Board, acting on the recommendation of an actuary, makes "the determination of the required employer contribution." MCL 38.1140m. Further, the statute explicitly provides that the Board "shall confirm" that the plan "provides for the payment of the required employer contribution" and "shall confirm" that the system receives "the required employer contribution . . . ." *Id.* "The word 'shall' is unambiguous and is used to denote mandatory, rather than discretionary, action." STC, Inc v Dep't of Treasury, 257 Mich. App. 528, 537; 669 N.W.2d 594 (2003). Thus, the statutory language **[*81]** is unequivocal that the Board determines the amount the employer (Detroit)

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[2] Section 20h(2), MCL 38.1140h(2), provides:

> Except as otherwise provided in subsection (4), a system shall have an annual actuarial valuation with assets valued on a market-related basis. A system shall prepare and issue a summary annual report. The system shall make the summary annual report available to the plan participants and beneficiaries and the citizens of the political subdivision sponsoring the system. The summary annual report shall include all of the following information:
>
> (a) The name of the system.
>
> (b) The names of the system's investment fiduciaries.
>
> (c) The system's assets and liabilities.
>
> (d) The system's funded ratio.
>
> (e) The system's investment performance.
>
> (f) The system's expenses.

contributes annually to **[***10]** the Retirement System and that the employer, in turn, is "required" to make the contribution. [3] The Board's determination also necessarily includes the amount of time in which Detroit must pay the unfunded accrued pension liabilities because the period directly affects the amount Detroit must contribute to the plan each year. [4]

[*11]** As noted, MCL 38.1140m states that the Board is to determine the annual contribution, which "consist[s] of a current service cost payment . . . and the payment of the annual accrued amortized portion of the unfunded principal liability." Thus, the statute contemplates that the Board, through an actuary, shall determine the annual payment, which includes a determination of the "amortized portion of the unfunded principal liability." *Id.* Moreover, the next portion of the statute provides:

> **[*82]** For fiscal years that begin before January 1, 2006, the required employer contribution shall not be determined using an amortization period greater than 40 years. For years that begin after December 31, 2005, the required employer contribution shall not be determined using an amortization period greater than 30 years. [*Id.*]

A plain reading of this section, in conjunction with the rest of MCL 38.1140m, compels the conclusion that, while the amortization period is capped at no greater than 30 years at the end of 2005, the actuary and the Board have discretion, within that limit, to determine the appropriate amortization period. Indeed, the above language **[***12]** evidences the Legislature's intent to grant the Board the authority to determine the **[**663]** amortization period because it included limits (caps) in its grant of authority to the Board to determine the employer's annual contribution. Further, it is self-evident that, because the Board has the responsibility to determine the employer's annual contribution to the system and to ensure that the system is adequately funded, an integral element of that calculation is how much the city must annually contribute to pay down its unfunded liabilities. Again, how long those liabilities are amortized, according to the calculations of the actuary, directly affects the adequacy of the system funding and the amount Detroit must pay each year.

Because MCL 38.1140m authorizes the Board to set the annual amortization periods, the statute conflicts with City Code § 54-2-6, which dictates that, after 1974, the amortization period shall decrease one year each year from 30 years to 20 years and that, once the period reaches 20 years, the amortization rate shall remain at 20 years. [5] Therefore, under the ordinance, by 1984, the

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[3] City Code § 54-43-4(b) also states:

> The board of trustees shall annually ascertain and report to the mayor and the council the amount of contributions due the retirement system by the city, and the city council shall appropriate and the city shall pay such contributions to the retirement system during the ensuing fiscal year. . . .

[4] City Code § 54-2-7 similarly provides:

> Based upon the provisions of this ordinance, including any amendments, the Board of Trustees shall compute the City's annual contributions, expressed as a percent of active member compensation, to the retirement system for the fiscal year beginning July 1, 1975, using actuarial evaluation data as of June 30, 1974, and for each subsequent fiscal year using actuarial evaluation data as of the June 30 date which is a year and a day before the first day of such fiscal year. The Board shall report to the Mayor and to the city council the contribution percents so computed and such contribution percent shall be used in determining the contribution dollars to be appropriated by the city council and paid to the retirement system. . . .

[5] The trial court did not agree that the statute and ordinance conflict. As the trial court observed:

> MCLA 38.1140m sets a ceiling on the amortization period for determining employer contributions: 40 years for fiscal years that begin before January 1, 2006 and 30 years for years that begin after December 31, 2005. The ordinance sets a floor of twenty years for the amortization period. If, as [the Board] contends, the ordinance has the inherent flaw of allowing the City to "effectively determine its annual pension contribution," thus potentially causing conflict in practice, it must be addressed legislatively.
>
> Plaintiff's actuary, who is mandated pursuant to MCLA 38.1140m to make recommendations to the Board taking into account actuarial standards of practice, agrees that the City "reserved the right to determine annual decrement probability and salary factors and the amortization term for financing unfunded accrued service pension liabilities." While the actuary finds that Ordinance 76-H, § 54-43-4, provides the Board with authority "to adopt, from time to time, assumptions as to future financial experiences," he harmonizes the ordinance provisions by reasoning that while the Board of Trustees is given authority to decide financial assumptions, the City Council retained authority to decide, inter alia, the amortization term relative to unfunded accrued service pension liabilities. Noting that he does not believe such a "restriction/reservation" is advisable, the actuary concludes that "[a]n ordinance change is required to use an amortization period other than twenty years regarding

amortization period would be 20 years and remain 20 **[*83]** years **[***13]** regardless of whether the Board and an actuary **[*84]** conclude that Detroit's contribution should be different.

[*14]** Detroit argues that the statute and the ordinance may arguably be read in conjunction **[**664]** to conclude that, while it is up to the Board to determine the amount Detroit owes based, in part, on the amortized portion of the unfunded principal liability, the city may determine the amortization period, as long as it complies with the Board's determination of how much it owes to cover the "amortized portion" of the unfunded liability. In other words, according to the city, Detroit may decide that its amortization period is 20 years if it complies with the caps in *MCL 38.1140m* and the Board's determination of how much it owes, including the current service cost, the amortized interest on unfunded actuarial liability, and the amortized portion of the unfunded principal liability.

Again, however, the Detroit ordinance directly interferes with the Board's authority to decide the annual contribution, which includes a determination of the amortization period. As this Court recently explained in *Shelby Charter Twp v Papesh, 267 Mich. App. 92, 105-106; 704 N.W.2d 92 (2005)*:

> State law preempts a municipal ordinance where the ordinance directly **[***15]** conflicts with a state statute or the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids, 455 Mich. 246, 257; 566 N.W.2d 514 (1997)*. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v Llewellyn, 401 Mich. 314, 322 n 4; 257 N.W.2d 902 (1977)*.

[*85] The ordinance clearly conflicts with the statute, and the statute prevails over the ordinance. The Legislature granted the Board the authority to determine the annual plan contributions, which necessarily includes the annual amortization period, and the statute granting that authority preempts the ordinance. [6] Accordingly, the trial court erred when it granted summary disposition to Detroit. We reverse the trial court's decision and grant the Board's declaratory judgment that it has the authority under applicable law to set the amortization period.

[*16]** Reversed.

/s/ Henry William Saad

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

> financing of unfounded [sic] accrued service pension liabilities."

The trial court's reasoning in the first paragraph is incorrect because *MCL 38.1140m* not only caps the amortization periods permitted for retirement systems, it provides that it is the Board's responsibility to determine Detroit's annual contribution, which would arguably include a determination of the amortization period.

Further, in the second paragraph above, the trial court erroneously attributes the quoted statements to the Board's actuary. According to the trial court, the actuary on whom the Board *must* rely in making its determination of the employer contribution under *MCL 38.1140m*, concluded that the statute and ordinance should be read together and that the correct interpretation gives the Detroit City Council the authority to decide the amortization period. As the Board points out in its appeal brief, the opinions the trial court attributed to the actuary were, in fact, those of a lawyer who was asked for a legal opinion, not those of the actuary charged with advising the Board. Furthermore, to the extent the trial court's opinion suggest otherwise, the City Code § 54-2-6 does not permit the city council any discretion to decide the amortization period; rather, the ordinance dictates that the amortization period shall remain at 20 years. Accordingly, the trial court erred in its interpretation of the evidence and the ordinance.

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[6] In light of our decision, we need not address the Board's equitable estoppel and laches claims.

EXHIBIT 6

Michigan Supreme Court
Lansing, Michigan

Opinion

JULY 28, 2005

SHIRLEY RORY and ETHEL WOODS,

Plaintiffs-Appellees,

v

No. 126747

CONTINENTAL INSURANCE COMPANY,
a/k/a CNA INSURANCE COMPANY

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

YOUNG, J.

In this case, the trial court refused to enforce the one-year contractual limitations period contained in the insurance policy issued to plaintiffs. The trial court did so because it concluded that the one-year limitations provision was "unfair," unreasonable, and an unenforceable adhesion clause. The Court of Appeals affirmed, and defendant Continental Insurance Company (Continental) appeals.

This case raises two fundamental questions of contract law: (1) are insurance contracts subject to a standard of

EXHIBIT
6

enforcement different from that applicable to other contracts, and (2) under what conditions may a court disregard and refuse to enforce unambiguous contract terms?

We hold, first, that insurance policies *are* subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions.

Finally, in addition to these traditional contract principles, in this case involving an insurance contract, the Legislature has enacted a statute that permits insurance contract provisions to be evaluated and rejected on the basis of "reasonableness." The Legislature has explicitly assigned this task to the Commissioner of the Office of Financial and Insurance Services (Commissioner) rather than the judiciary. The Commissioner has allowed the

Continental insurance policy form to be issued and used in Michigan. No party here has challenged the Commissioner's action to allow the Continental policy to be issued or used in this state.

Accordingly, we reverse the Court of Appeals decision and remand the case to the circuit court for entry of an order of summary disposition in favor of defendant.

I. Facts and Procedural History

Plaintiffs maintained an automobile insurance policy with defendant, which included optional coverage for uninsured motorist benefits. On May 15, 1998, plaintiffs were injured in an automobile accident. The police report filed at the time of the collision did not indicate whether either party was insured. More than a year later, in September 1999, plaintiffs filed a first-party no-fault suit against defendant and a third-party suit for noneconomic damages against Charlene Haynes, the driver of the other vehicle. Only after the suit was commenced was it discovered that Haynes was uninsured. On March 14, 2000, plaintiffs submitted a claim for uninsured motorist benefits to Continental. Defendant denied the claim because it was not filed within one year after the accident, as required by the insurance policy.

In August 2000, plaintiffs filed the present action, contesting Continental's denial of uninsured motorist benefits. Defendant filed a motion for summary disposition, relying on a limitations provision in the insurance contract that required that a claim or suit for uninsured motorist coverage "must be brought within 1 year from the date of the accident."

The trial court denied defendant's motion, holding that the one-year limitations period contained in the contract was unreasonable. After the Court of Appeals issued an opinion in an unrelated case,[1] defendant renewed its motion for summary disposition.

The trial court again denied defendant's motion for summary disposition, holding that the one-year limitation was an unenforceable adhesion clause. Because the limitation was not highlighted in the contract, was not bargained for by the purchaser, and constituted a "significant reduction" in the time plaintiffs would otherwise have to file suit against defendant, the trial

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[1] *Williams v Continental Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 229183). In *Williams*, the panel considered identical policy language and concluded that the one-year limitation was "not so unreasonable as to be unenforceable" because the policy required that a claim be filed within a year, rather than a lawsuit.

court held that it would be "totally and patently unfair" to enforce the limitation contained in the policy.

On appeal, the Court of Appeals affirmed the trial court's decision to deny defendant's motion for summary disposition.[2] The Court of Appeals agreed with the trial court that a one-year period of limitations was unreasonable. The panel instead imposed a three-year period of limitations, holding:

> An insured may not have sufficient time to ascertain whether an impairment will affect his ability to lead a normal life within one year of an accident. Indeed, three of the factors to be considered in determining whether a serious impairment exists are the duration of the disability, the extent of residual impairment, and the prognosis for eventual recovery. Further, unless the police report indicates otherwise, the insured will not know that the other driver is uninsured until suit is filed, and the other driver fails to tender the defense to an insurance company. The insured, thus, must file suit well before the one-year period in order to assure that the information is known in time to make a claim or file suit against the insurance company within one year of the accident. Applying the standard set forth in *Camelot*, . . . we conclude that the limitation here is not reasonable because, in most instances, the insured (1) does not have "sufficient opportunity to investigate and file an action," where the insured may not have sufficient information about his own physical condition to warrant filing a claim, and will likely not know if the other driver is insured until legal process is commenced, (2) under these circumstances, the time will often be "so short as to work a

[2] 262 Mich App 679; 687 NW2d 304 (2004).

> practical abrogation of the right of action," and (3) the action may be barred before the loss can be ascertained.
>
> * * *
>
> Here, the Legislature has provided a three-year limitations period for personal injury claims. The insured must sue the other driver within three years of the injury, whether or not the insured has sufficient information to know if a serious impairment has been sustained, and whether or not the other driver is insured. Application of the three-year period would not deprive the insured of a sufficient opportunity to investigate and file a claim and does not work a practical abrogation of the right. [*Id.* at 686-687 (internal citations omitted).][3]

Subsequently, we granted defendant's application for leave to appeal.[4]

II. Standard of Review

This Court reviews de novo the trial court's decision to grant or deny summary disposition.[5] In reviewing the motion, the pleadings, affidavits, depositions, admissions, and any other admissible evidence are viewed in the light

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[3] Relying on *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14; 564 NW2d 857 (1997), the Court of Appeals agreed with the trial court that the insurance policy was adhesive and "should receive close judicial scrutiny." 262 Mich App at 687.

[4] 471 Mich 904 (2004).

[5] *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999).

most favorable to the nonmoving party.[6] Moreover, questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo.[7] In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument.[8]

III. Analysis

A. The "Reasonableness Doctrine" In Michigan

Under the language of the insurance policy at issue, an insured is required to file a claim or lawsuit for uninsured motorist benefits "within 1 year from the date of the accident." Plaintiff asks this Court to refuse to enforce that provision of the insurance contract because the limitations period is not "reasonable." This action, being a claim arising under the insurance policy, is a first-party claim against the insurer. Therefore, contrary to the Court of Appeals conclusion that a three-year period

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[6] *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

[7] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

[8] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

of limitations applies to this lawsuit, plaintiff's suit against Continental—in the absence of the limitations provision contained in the policy—would be governed by the general six-year period of limitations applicable to contract actions.[9]

Uninsured motorist insurance permits an injured motorist to obtain coverage from his own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver.[10] Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act.[11] Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act.[12]

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[9] MCL 600.5807(8). If plaintiffs brought suit against the at-fault driver instead of their own insurance carrier, such a third-party claim would be limited to being brought within three years pursuant to former MCL 600.5805(9), now MCL 600.5805(10), which governs claims for injury to person or property.

[10] The owner or operator of a vehicle is subject to tort liability for noneconomic loss only if the injured motorist has suffered death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1); *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004); *Auto Club Ins Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988).

[11] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004).

[12] *Id.*

In support of their claim that a contractual limitations provision may be disregarded on the basis of an assessment of "reasonableness," plaintiffs rely on *Tom Thomas Org, Inc v Reliance Ins Co.*[13] In *Tom Thomas,* the plaintiff filed suit fifteen months after the loss to recover for property damage under an insurance policy. The policy contained a one-year limitation on filing suit.

Even a cursory reading of *Tom Thomas* reveals that the holding of the case was premised on "judicial tolling" rather than reasonableness. In fact, the majority in *Tom Thomas* specifically declined to address the reasonableness of the one-year limitation; instead, it predicated its holding on "reconciliation of the provisions of the policy" by the imposition of judicial tolling.[14] In dicta, the Court noted the "general rule" that a shortened contractual period of limitations was "valid *if reasonable* even though the period is less than that prescribed by otherwise applicable statutes of limitation."[15]

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[13] 396 Mich 588; 242 NW2d 396 (1976).

[14] The *Tom Thomas* Court held that the contractual period of limitations was judicially tolled "from the time the insured gives notice until the insurer formally denied liability." *Id.* at 597.

[15] *Id.* at 592 (emphasis added). In support of the "general rule," the *Tom Thomas* Court cited a secondary (continued…)

In *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*,[16] this Court expanded upon the "reasonableness" dicta articulated in *Tom Thomas*. In *Camelot*, the plaintiff sought payment on a labor and material bond from the defendant. The defendant moved for summary disposition on the basis of the one-year limitations period contained in the bond contract. Citing *Tom Thomas* for the proposition

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(…continued)
source rather than Michigan authority. However, the opinion subsequently noted that prior Michigan case law had enforced shortened contractual limitations periods without resort to a "reasonableness" analysis. *Id.* at 592 n 4.

In fact, prior case law had consistently upheld the validity of contractually shortened limitations periods; such provisions could be avoided only where the insured could establish waiver on the part of the insurer or estoppel. See *McIntyre v Michigan State Ins Co*, 52 Mich 188; 17 NW 781 (1883); *Law v New England Mut Accident Ass'n*, 94 Mich 266; 53 NW 1104 (1892); *Turner v Fidelity & Cas Co*, 112 Mich 425; 70 NW 898 (1897) (insurance company waived one-year limitation by conduct); *Harris v Phoenix Accident & Sick Benefit Ass'n*, 149 Mich 285; 112 NW 935 (1907) (failure of the insured to sue within six months was not waived); *Friedberg v Ins Co of North America*, 257 Mich 291; 241 NW 183 (1932) (where settlement negotiations are broken off by the insurer near the end of the contractual limitations period, the provision was deemed waived); *Hall v Metro Life Ins Co*, 274 Mich 196; 264 NW 340 (1936); *Barza v Metro Life Ins Co*, 281 Mich 532; 275 NW 238 (1937) (the plaintiff was bound by two-year limitations clause where there was no evidence of waiver or estoppel); *Bashans v Metro Mut Ins Co*, 369 Mich 141; 119 NW2d 622 (1963) (insurer did not waive two-year "binding" limitations clause); *Better Valu Homes, Inc v Preferred Mut Ins Co*, 60 Mich App 315; 230 NW2d 412 (1975).

[16] 410 Mich 118; 301 NW2d 275 (1981).

that a shortened period of limitations is acceptable "where the limitation is reasonable,"[17] *Camelot* relied on case law from foreign jurisdictions in articulating a three-part test for evaluating the reasonableness of a contractually shortened limitations period.[18] Ultimately, the Court held that the one-year period of limitations was reasonable, and that no public policy considerations precluded enforcement of the contractual provision.

In the end, *Camelot* enforced the contractually shortened limitations period at issue. However, rather than simply enforcing the contract as written, the decision in *Camelot* was premised upon the adoption of a "reasonableness" test found in the dicta of *Tom Thomas*. In

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[17] *Camelot* also cited *Barza v Metro Life* and *Turner v Fidelity*, n 15 *supra*, in support of the "rule" that a contractual limitations provision may be upheld if reasonable. *Camelot, supra* at 126. However, neither *Barza* nor *Turner* may be properly read as requiring reasonableness before a contractual provision may be deemed valid. In both cases, the analysis focused on whether the insurer waived the otherwise binding limitations provision.

[18] *Camelot* held that a contractually shortened limitations period is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained. *Id.* at 127.

failing to employ the plain language of the contract, the *Camelot* Court erred.

A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.*[19] Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "'[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.'"[20]

When a court abrogates unambiguous contractual provisions based on its own independent assessment of

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[19] *Harrington v Inter-State Business Men's Accident Ass'n*, 210 Mich 327; 178 NW 19 (1920); *Indemnity Ins Co of North America v Geist*, 270 Mich 510; 259 NW 143 (1935); *Cottrill v Michigan Hosp Service*, 359 Mich 472; 102 NW2d 179 (1960); *Henderson v State Farm Fire & Cas Co*, 460 Mich 348; 596 NW2d 190 (1999); *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588; 648 NW2d 591 (2002).

[20] *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931).

"reasonableness," the court undermines the parties' freedom of contract.[21] As this Court previously observed:

> This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School,

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[21] Justice Kelly maintains that reviewing contract provisions for "reasonableness" is "essential in order to accurately implement the intent of the contracting parties." *Post* at 6. However, it is difficult to rationalize implementing the intent of the parties by imposing contractual provisions that are *completely antithetic* to the provisions contained in the contract. Rather, the intent of the contracting parties is best discerned by the language actually used in the contract. As this Court noted in *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003), "an unambiguous contractual provision is reflective of the parties' intent as a matter of law."

who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:

> "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made. [15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17.]"[22]

Accordingly, we hold that an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of "reasonableness" is an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision.[23] To the degree that *Tom Thomas*, *Camelot*, and their progeny abrogate unambiguous contractual terms on the basis of reasonableness determinations, they are overruled.[24]

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[22] *Wilkie*, *supra* at 51-52.

[23] Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability. See *Quality Products & Concepts Co*, *supra* (waiver); *Beloskursky v Jozwiak*, 221 Mich 316; 191 NW 16 (1922) (estoppel); *Hackley v Headley*, 45 Mich 569; 8 NW 511 (1881) (duress); *Witham v Walsh*, 156 Mich 582; 121 NW 309 (1909) (fraud); *Gillam v Michigan Mortgage-Investment Corp*, 224 Mich 405; 194 NW 981 (1923) (unconscionability).

[24] Justice Kelly maintains that the *Camelot* Court "applied a very old and well tested legal rule" when it

(continued…)

B. THE PROVISION IS NOT CONTRARY TO LAW OR PUBLIC POLICY

We next consider whether the contractually shortened period of limitations violates law or public policy. As noted by this Court, the determination of Michigan's public policy "is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law."[25] In ascertaining the parameters of our public policy, we must look to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law."[26]

As an initial matter, we note that this Court has previously held that Michigan has "no general policy or statutory enactment . . . which would prohibit private

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(…continued)
adopted the so-called "reasonableness doctrine." *Post* at 7. However, as even the *Tom Thomas Court* recognized, Michigan jurisprudence enforced contractually shortened limitations provisions without regard to the "reasonableness" of the provisions. See n 15 of this opinion. Citation of case law from other jurisdictions simply does not alter the fact that the "very old and well tested legal rule" of *Michigan* eschewed using "reasonableness" as a basis for abrogating contractually shortened limitations provisions.

[25] *Terrien*, *supra* at 67.

[26] *Id.* at 66-67.

parties from contracting for shorter limitations periods than those specified by general statutes."[27] This is consistent with our case law, which had held that contractually shortened periods of limitations were valid, and were to be disregarded only where the insured could establish estoppel or prove that the insurer waived the contractual provision.[28]

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[27] *Camelot*, *supra* at 139.

[28] See n 15 of this opinion. Amicus cites *Price v Hopkin*, 13 Mich 318 (1865), and *Lukazewski v Sovereign Camp of the Woodmen of the World*, 270 Mich 415; 259 NW 307 (1935), in support of the claim that Michigan case law has a "long-standing policy" of disregarding "unreasonable" contractual limitations periods. However, both cases are distinguishable.

In *Price*, the Legislature shortened a statute of limitations from twenty to fifteen years, giving the amendment retroactive effect. The plaintiff's grantor "was entitled by the existing statutes to bring her action within twenty years," but the statutory amendment immediately severed her cause of action. *Price*, *supra* at 323-324. Justice Cooley held that the retroactive statutory amendment was unconstitutional as violative of due process because it annihilated a vested right without permitting a "reasonable time" to bring the lawsuit. *Id.* at 324-328.

Likewise, *Lukazewski* is also distinguishable. There, the plaintiff was the beneficiary of a life insurance policy that required "proof of the insured's actual death." The policy also required that all lawsuits be commenced within one year from the date of death. The insured disappeared in 1925, but proof of his death was not established until 1932. The defendant "denied liability on the ground that both the contractual and statutory limitations" had expired. *Lukazewski*, *supra* at 417-418.

(continued...)

Likewise, there is no Michigan statute explicitly prohibiting contractual provisions that reduce the limitations period in uninsured motorist policies. The Legislature has proscribed shortened limitations periods in only one specific context: life insurance policies. MCL 500.4046(2).[29]

(…continued)

The *Lukazewski* Court held that, because the policy required affirmative proof of the decedent's death, the one-year limitations period would not begin to run until the death was discovered. The *Lukazewski* Court utilized the doctrine of judicial tolling, which is not at issue in the present case, to suspend the running of the contractual limitations period. However, it is unclear why the contractual limitations period was considered at all, as the contract provision violated the law. 1917 PA 256 was enacted four years before the issuance of the life insurance policy. 1917 PA 256, part 3, ch 2, § 4, contains a provision that is substantively identical to our current MCL 500.4046(2), see n 29 of this opinion. Thus, because the policy required actual proof of death, the cause of action did not accrue until death could be proven. The plain language of the statute provided the plaintiff six years *from the time the cause of action accrued* to file suit.

[29] MCL 500.4046 states in pertinent part:

> No policy of life insurance other than industrial life insurance shall be issued or delivered in this state if it contain [sic] any of the following provisions:
>
> * * *
>
> (2) A provision limiting the time within which any action at law or in equity may be commenced to less than 6 years after the cause of action shall accrue[.]

Notwithstanding the fact that the Commissioner approved for use the contract at issue in this case, the Commissioner now argues to this Court that MCL 500.2254 precludes contractual periods of limitations that are less than six years. The statute provides in part:

> No article, bylaw, resolution or policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in this state: Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant.

The plain language of the statute states that "[n]o . . . policy provision . . . *prohibiting* a member or beneficiary from commencing and maintaining [a lawsuit] against [the insurer] . . . shall be valid . . . ." (Emphasis added.) The common definition of "prohibit" is "to forbid by authority or command."[30] Clearly, the statute proscribes contractual provisions that forbid or preclude

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[30] *New International Dictionary of the English Language* (1954), p 1978.

the commencement or maintenance of a lawsuit. The statute does not, however, bar the imposition of conditions that may be placed on the commencement and maintenance of a lawsuit.[31]

While nothing in our statutes explicitly addresses contractually shortened limitations periods outside the context of life insurance policies, we note that the Legislature *has* provided a mechanism to ensure the reasonableness of insurance policies issued in the state of Michigan.

MCL 500.2236(1) requires that all "basic insurance policy" forms be filed with the Commissioner's office and be approved by the Commissioner before a policy may be issued by an insurance company. If the Commissioner fails to act within thirty days after the policy form is submitted, the form is deemed approved. MCL 500.2236(1). One of the factors that the Commissioner may consider in determining whether to approve an insurance policy is the reasonableness of the conditions and exceptions contained therein. MCL 500.2236(5) and (6) provide:

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[31] We note that Justice Kelly's construction of this provision would render invalid any contractual limitations provision in an insurance contract, even one that paralleled the applicable statutory limitations period. *Post* at 15-16.

> (5) Upon written notice to the insurer, the commissioner *may* disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or *contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.* The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately.
>
> (6) If a form is disapproved or approval is withdrawn under the provisions of this act, the insurer is entitled upon demand to a hearing before the commissioner or a deputy commissioner within 30 days after the notice of disapproval or of withdrawal of approval. After the hearing, the commissioner shall make findings of fact and law, and either affirm, modify, or withdraw his or her original order or decision. [Emphasis added.]

Clearly, the Legislature has assigned the responsibility of evaluating the "reasonableness" of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of Insurance.[32] The statute

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[32] In other contexts, the Legislature has *explicitly* assigned the responsibility of assessing the reasonableness of private contracts to the judiciary. See, for example, MCL 445.774a, which governs noncompetition covenants between an employer and an employee.

(continued...)

permits, but does not require, the Commissioner to disapprove or withdraw an insurance contract if the Commissioner determines that a condition or exception is unreasonable or deceptive. The decision to approve, disapprove, or withdraw an insurance policy form is within the sound discretion of the Commissioner. In this instance, the Commissioner has approved the Continental policy form containing the shortened limitations provision for issuance and use in the state of Michigan.[33]

Our courts have a very limited scope of review concerning the decisions made by the Commissioner. MCL 500.244(1) provides that an aggrieved person may seek judicial review of an "order, decision, finding, ruling, opinion, rule, action, or inaction" of the Commissioner as provided by the Administrative Procedures Act, MCL 24.201 *et seq*. MCL 24.306 provides:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been

(…continued)

[33] Justice Kelly erroneously reads MCL 500.2236(5) as rendering the Commissioner's *review* of a policy form discretionary. *Post* at 18-19. However, under that statutory subsection, the Commissioner's discretion extends only to the ability to "disapprove, withdraw approval or prohibit the issuance" of a policy form.

> prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.

Here, plaintiffs have not challenged the decision of the Commissioner to allow issuance of the Continental policy, much less shown that the Commissioner's decision was arbitrary, capricious, or a clear abuse of discretion [34] Accordingly, the explicit "public policy" of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government. As such, the lower courts were not free to invade the

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[34] Certainly, if the Commissioner were to determine subsequently that the provision at issue unreasonably affected the risk assumed in the policy, MCL 500.2236(5) and (6) provide the appropriate mechanism for withdrawing approval of the policy condition.

jurisdiction of the Commissioner and determine de novo whether Continental's policy was reasonable.

C. Adhesion Contracts

We turn finally to the trial court's conclusion that the policy was an "adhesion contract" and was therefore unenforceable. The trial court's ruling rested on the assumption that "adhesion contracts" are subject to a greater level of judicial scrutiny than other contracts—and, indeed, that so-called adhesion contracts need not be enforced if the court views them as unfair. The Court of Appeals reached a similar conclusion:

> We further note that the concern the Court expressed in *Herweyer* is present here as well. The insured had the option of accepting uninsured motorist coverage or rejecting it, but could not have bargained for a longer limitations period. Accordingly, the policy should receive close judicial scrutiny. [262 Mich App at 687][35]

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[35] Justice Kelly charges that, in addressing the *Herweyer* adhesion contract issue, we are "engag[ing] in judicial activism". *Post* at 28. This is a strange accusation given that *both* the trial court and the Court of Appeals relied on the adhesion contract principles announced in *Herweyer* as a basis for invalidating the contractual limitations provision at issue. We think it unremarkable for this Court to address an issue that all the lower courts addressed. Moreover, because it was *Herweyer* that literally ignored nearly a century of contrary precedent in adopting a new rule of contractual construction (see n 15 of this (continued...)

The contract construction approach of the lower courts is inconsistent with traditional contract principles. An "adhesion contract" is simply that: a contract.[36] It must be enforced according to its plain terms unless one of the traditional contract defenses applies.

Indeed, a careful examination of our contract jurisprudence reveals that the "adhesion contract doctrine" existed in Michigan solely in dicta until it was implicitly adopted by this Court in *Herweyer v Clark Hwy Services, Inc*. Moreover, it was adopted in *Herweyer* without substantive analysis, and without reference to and in contravention of more than one hundred years of contrary case law from this Court.

Before turning to the state of the "adhesion contract doctrine" in our jurisprudence, it is important to begin

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(…continued)
opinion), the claim of "judicial activism" would seem most accurately applied to the *Herweyer* majority.

[36] There are many descriptive labels that are used to categorize species of contracts: "unilateral," see, e.g., *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 138 n 9; 666 NW2d 186 (2003), "executory," see, e.g., *Kolton v Nassar*, 358 Mich 154, 156; 99 NW2d 362 (1959), "installment," *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 532 n 5; 676 NW2d 616 (2004), etc. The fact that a particular label is attached to a contract does not exempt the contract from the application of standard contract law principles.

with a sense of how the notion of an "adhesive" contract arose in the first place. The term "adhesion contract" was originally coined simply as a descriptive label for a common contract practice in the insurance industry. The term was introduced in a 1919 law review article by University of Colorado Law School professor Edwin W. Patterson to describe a life insurance policy term requiring "delivery of the policy to the applicant" before the policy became effective.[37] Professor Patterson made the observation that "[l]ife-insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms."[38] Patterson noted that "a majority of the courts have strictly enforced" such contractual stipulations, although some courts had "executed successful flanking movements" to find either that the insurer had waived the requirement, or that the policy had been delivered.[39] Thus, the original designation of "adhesion contract" described a *type* of contract, but did not suggest

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[37] Patterson, *The delivery of a life-insurance policy*, 33 Harv L R 198 (1919).

[38] *Id.* at 222.

[39] *Id.* at 221.

that such a description rendered the contract or its provisions unenforceable.

It was not until a quarter-century later that Patterson's label for life insurance contracts evolved into something resembling a "doctrine." In 1943, Yale Law School Professor Friedrich Kessler expanded on Patterson's description of practices in the life insurance industry to argue that courts should simply refuse to enforce unfair provisions of "adhesion contracts" rather than utilize traditional contract law principles.[40] While conceding that "society as a whole ultimately benefits from the use of standard contracts," Professor Kessler nonetheless maintained that such contracts were typically used by enterprises with "strong bargaining power," and that the "weaker party" frequently could not "shop around for better terms, either because the author of the standard contract [had] a monopoly" or because all competitors used the same clauses.[41] Kessler expressed concern that "powerful industrial and commercial overlords" would impose "a new

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[40] Kessler, *Contracts of adhesion—some thoughts about freedom of contract*, 43 Colum L R 629 (1943). Kessler advocated that the "task of adjusting" contract law as it applied to adhesion contracts had to "be faced squarely and not indirectly." *Id.* at 637.

[41] *Id.* at 632.

feudal order of their own making upon a vast host of vassals."[42]

While noting that "freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture,"[43] Kessler asserted that the meaning of "freedom of contract" varied with "the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract."[44] Thus, Kessler advocated nonenforcement of clauses contained in standardized contracts, but *only* where the type of contract was of sufficient "social importance" and where the author of the contract enjoyed a monopoly over the socially important good or service.

The groundwork for the "adhesion contract doctrine" was thus laid in academia, first in Patterson's positive analysis and then in Kessler's normative article. In Michigan, the notion was first imported into our case law in 1970. In *Zurich Ins Co v Rombough*,[45] the issue to be determined was whether an insurer had a duty to defend when

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42 *Id.* at 640.

43 *Id.* at 641.

44 *Id.* at 642.

45 384 Mich 228; 180 NW2d 775 (1970).

its policy contained two apparently conflicting provisions.[46] The opinion noted that "[i]t is elemental insurance law that ambiguous policy provisions must be construed against the insurance company and most favorably to the premium-paying insured."[47] After noting this legal principle, the *Rombough* Court cited the following language from a California Supreme Court case to further support its rule of construction:

> Justice Tobriner, writing for the California Supreme Court in the case of *Gray* v. *Zurich Insurance Company* (1966), 65 Cal 2d 263 (54 Cal Rptr 104, 419 P2d 168), construing similar provisions, said:
>
> "In interpreting an insurance policy we apply the general principle that doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.
>
> "*These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract.* As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more

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[46] The policy contained an exclusion clause, indicating that the policy did not apply if insured vehicles were "used to carry property in any business." *Id.* at 230. The policy also contained a provision indicating that the company would provide a defense for any lawsuit even if the suit was "groundless, false or fraudulent." *Id.* at 231.

[47] *Id.* at 232.

> powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it basis' carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.
>
> "Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect."[48]

The *Rombough* Court concluded by purporting to "adopt" the reasoning of *Gray v Zurich*, holding that the policy language was "sufficiently ambiguous" to require plaintiff to provide a defense.[49]

Thus, the term "adhesion contract" was first introduced in Michigan jurisprudence in support of the rule of *contra proferentem*,[50] wherein contract terms are

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[48] *Id.* at 232-233. The practice of interpreting contracts on the basis of reasonable expectations rather that the plain language of the contract was repudiated by this Court in *Wilkie, supra* at 63.

[49] *Rombough, supra* at 234.

[50] See also *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003) (discussing *contra proferentem* as a rule of legal effect, to be utilized only after all conventional means of contract interpretation have been applied).

construed against the drafter in the event of an ambiguity to meet the "reasonable expectations" of the insured. However, because *Rombough* was decided on the basis of *contra proferentem*—a rule of interpretation providing that truly ambiguous contractual language is to be construed against the drafter[51]—its language regarding adhesion contracts is, as we stated in *Wilkie*,[52] properly classified as obiter dicta.

Subsequently, in *Cree Coaches, Inc v Panel Suppliers, Inc*,[53] this Court referred again to the "adhesion contract" concept. The defendant in *Cree Coaches* had constructed a building for the plaintiff pursuant to a contract that limited the warranty to one year after the contract was completed. Six years later, the building collapsed from the weight of snow. In *upholding* the provisions limiting the plaintiff's warranty claims and the warranty period, the Court noted in dicta—and without analysis—that the Court did not regard the construction contract "as a contract of adhesion from which public policy would grant relief."[54]

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51 See, e.g., *Twichel*, *supra* at 535 n 6.

52 *Wilkie*, *supra* at 55-56.

53 384 Mich 646; 186 NW2d 335 (1971).

54 *Id.* at 649.

(continued…)

This digression was cryptic at best, because this Court had never before declined to enforce an "adhesion contract."

The term "adhesion contract" was discussed again a decade later in *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co.*[55] In his concurring opinion, Justice Levin agreed with the majority that a clause in a construction insurance bond limiting the time within which the insured could bring suit to one year was enforceable. He stated, however, that "[a]n adhesion contract-such as most contracts of insurance-in which the shortened period has not actually been bargained for, or which operates to defeat the claim of an intended beneficiary not involved in the bargaining process," would "present a different case."[56] Again, the basis for Justice Levin's assertion is unclear, because characterization of an agreement as an adhesive contract had never before been pivotal in the Court's analysis or enforcement of a contract.

The development of the notion that adhesion contracts were subject to different standards of enforcement was dealt a significant blow in *Raska v Farm Bureau Mut Ins Co*

(...continued)

[55] 410 Mich 118; 301 NW2d 275 (1981).

[56] *Id.* at 142-143.

of Michigan.[57] There, the plaintiff brought suit for breach of an automobile policy and for a declaratory judgment that an "owned automobile" exclusion was ambiguous and should be construed against the insurer, and was void as contrary to public policy. This Court not only *enforced* the contractual policy exclusion, but held that "[*a*]*ny* clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy."[58] In dissent, Justice Williams stated that he would have declined to enforce the contractual exclusion because "an insurance contract, as a contract of adhesion, is construed in favor of the insured," as well as because of the "reasonable expectations" of the insured.[59] *Raska*, therefore, stands for the proposition that an insurance contract must be interpreted like any other contract: according to its plain unambiguous terms.

This Court's first attempt at describing the elements of the adhesion contract doctrine—a doctrine the Court had yet to adopt—was the plurality opinion in *Morris* v

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57 412 Mich 355; 314 NW2d 440 (1982).

58 *Id.* at 361-362 (emphasis added).

59 *Id.* at 364.

Metriyakool.[60] There, the plaintiff signed an arbitration agreement upon admission to the hospital for medical treatment. The hospital presented the arbitration agreement pursuant to the former medical malpractice arbitration act (MMAA).[61] At issue was the question whether the MMAA was unconstitutional as violative of the plaintiff's due process rights. After determining that the act did not implicate due process concerns, Justice Kavanagh, joined by Justice Levin, rejected the plaintiff's assertion that the contract was one of adhesion, holding:

> Contracts of adhesion are characterized by standardized forms prepared by one party which are offered for rejection or acceptance without opportunity for bargaining and under the circumstances that the second party cannot obtain the desired product or service except by acquiescing in the form agreement. Regardless of any possible perception among patients that the provision of optimal medical care is conditioned on their signing the arbitration agreement, we believe that the sixty-day rescission period, of which patients must be informed, fully protects those who sign the agreement. The patients' ability to rescind the agreement after leaving the hospital allows them to obtain the desired service without binding them to its terms. *As a result, the agreement cannot be considered a contract of adhesion*. [62]

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60 418 Mich 423; 344 NW2d 736 (1984).

61 Former MCL 600.5040 *et seq*.

62 *Id*. at 440 (citations omitted; emphasis added). Justices Kavanagh and Levin further determined that the arbitration agreement was not "unconscionable" because it

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Writing separately, Justice Ryan, joined by Justice Brickley, held that the MMAA did not violate due process concerns because there was no state action. In addressing the plaintiff's claim that the arbitration agreement was an adhesion contract, Justice Ryan stated:

> A contract of adhesion is a contract which has some or all of the following characteristics: the parties to the contract were of unequal bargaining strength; the contract is expressed in standardized language prepared by the stronger party to meet his needs; and the contract is offered by the stronger party to the weaker party on a "take it or leave it" basis. Therefore, the essence of a contract of adhesion is a nonconsensual agreement forced upon a party against his will. [63]

Justice Ryan agreed with the majority, however, that the contracts at issue in *Morris* were not adhesion contracts. Thus, while a majority of the *Morris* Court agreed that the contracts at issue were not contracts of adhesion, a majority could not agree on what, in fact, made a contract one of adhesion.[64]

(…continued)
was "not a long contract" and because arbitration was "the essential and singular nature of the agreement." *Id.* at 441.

[63] *Id.* at 471-473 (citation omitted).

[64] Justice Williams concurred with Justice Kavanagh on the ground of constitutionality only, while Justice (continued…)

The plurality opinion of *Powers v Detroit Automobile Inter-Ins Exch*[65] asserted that *all* insurance contracts are adhesion contracts: nonnegotiated, take-it-or-leave-it, standardized forms, drafted by "insurance and legal experts of a state, national, or international organization, hundreds and maybe thousands of miles away."[66] The plurality opinion utilized the now-repudiated doctrine of reasonable expectations to resolve the case,[67] noting that an ambiguity was not a necessary precondition for invoking that doctrine. Thus, rather than assessing whether the contract was indeed adhesive, the *Powers* plurality opinion decreed that all insurance contracts were contracts of adhesion, applying the reasonable expectations doctrine without regard to ambiguity.

(…continued)
Cavanagh issued a dissent addressing only the constitutional issue. Justice Boyle did not participate in the resolution of the case.

[65] 427 Mich 602; 398 NW2d 411 (1986), overruled by *Wilkie, supra* at 63.

[66] *Id.* at 608. Only Justice Archer joined Justice Willams's opinion. Justices Brickley and Cavanagh concurred in the result only.

[67] See *Wilkie, supra*.

The concept of "adhesion contracts" took yet another turn in *Auto Club Ins Ass'n v DeLaGarza*.[68] The *DeLaGarza* majority concluded that the insurance policy at issue was ambiguous and was therefore to be construed "against the drafter of the provision and in favor of coverage."[69] Again, in dicta, the Court endorsed the notion that certain contracts are adhesive and are therefore to be construed in favor of the insured.[70]

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[68] 433 Mich 208; 444 NW2d 803 (1989).

[69] *Id.* at 218.

[70] *Id.* at 215 n 7, noting the "judicial predisposition toward the insured," and quoting 7 Williston, Contracts (3d ed), § 900, pp 19-20:

> "The fundamental reason which explains this and other examples of judicial predisposition toward the insured is the deep-seated, often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance 'contracts of adhesion' with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a 'take-it-or-leave-it' basis if he wishes insurance protection."

Finally, in *Herweyer v Clark Hwy Services, Inc*,[71] this Court declined to enforce the plain language of a contract arguably because the contract at issue was adhesive. *Herweyer* concerned the validity of a shortened limitations provision in an employment contract and the application of a saving clause that required enforcement of the contract "as far as legally possible." In concluding that the six-month limitations period in the contract at issue was unenforceable, *Herweyer* cited Justice Levin's concurring opinion in *Camelot*:

> In *Camelot*, Justice Levin expressed concerns about the development of a rule authorizing contractually shortened periods of limitation. He reasoned:
>
> > "The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.
> >
> > "In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable."[72]

Solely on the basis of Justice Levin's concurring opinion in *Camelot*, the *Herweyer* Court indicated—for the first time

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71 455 Mich 14; 564 NW2d 857 (1997).

72 *Herweyer, supra* at 20-21 (citation omitted).

in this Court's history—that a so-called "adhesion contract" was unenforceable simply because of the disparity in the contracting parties' "bargaining power":

> We share Justice Levin's concerns. Employment contracts differ from bond contracts. An employer and employee often do not deal at arms length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike in *Camelot* where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. *Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny.*[73]

The *Herweyer* Court did not cite a single majority opinion of this Court to support its conclusion. More astonishingly, the majority failed to recognize—much less distinguish or overrule—more than a century of contrary case law belying its conclusion that a shortened limitations period was unenforceable.[74]

The preceding analysis shares many similarities with our decision in *Wilkie*, in which we also sought to clarify this state's contract jurisprudence. As in *Wilkie*,

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[73] *Id.* at 21 (emphasis added).

[74] See n 15 of this opinion; see also *Tom Thomas*, *supra* at 592 n 4.

analyzing the concept of adhesive contracts in our jurisprudence requires that we confront "a confused jumble of ignored precedent, silently acquiesced to plurality opinions, and dicta, all of which, with little scrutiny, have been piled on each other to establish authority."[75]

Here, this "confused jumble" is exemplified by *Herweyer*, which held for the first time in our contract jurisprudence that an adhesion contract is subject to "close judicial scrutiny" and may be voided if the contract fails to meet the court's satisfaction. This holding was inconsistent not only with a century of case law to the contrary,[76] but with the very principles upon which that jurisprudence is based—namely, freedom of contract and the liberty of each person to order his or her own affairs by agreement.

Today we are faced with a choice. We may follow *Herweyer* and its summary conclusion that "[w]here one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny."[77] Or we

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[75] *Wilkie*, *supra* at 60.

[76] See n 15 of this opinion.

[77] *Herweyer*, *supra* at 21.

(continued…)

may, consistently with the many cases that *Herweyer* presumptively displaced without overruling them, hold that an adhesion contract is simply a type of contract *and* is to be enforced according to its plain terms just as any other contract. We choose the latter course because it is most consonant with traditional contract principles our state has historically honored.

As with any contract, the "rights and duties" of a party to an adhesion contract are "derived from the terms of the agreement."[78] A party may avoid enforcement of an "adhesive" contract only by establishing one of the traditional contract defenses, such as fraud, duress, unconscionability, or waiver.[79] As we stated in *Raska*,[80] and reaffirmed in *Wilkie*:[81]

> The expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that there was no

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(…continued)

[78] *Wilkie*, *supra* at 62.

[79] See n 23 of this opinion.

[80] *Raska*, *supra* at 362-363.

[81] *Wilkie*, *supra* at 63.

> contract at all for there was no meeting of the minds.
>
> But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.

Therefore, we hold that it is of no legal relevance that a contract is or is not described as "adhesive." In either case, the contract is to be enforced according to its plain language. Regardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable.[82]

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[82] In dissent, Justice Kelly opines that adhesion contracts should be viewed "with skepticism" because "[m]ost people simply do not have the opportunity, time, or special ability to read the policy before agreeing to it." *Post* at 23, 25. However, an insured's failure to read his or her insurance contract has never been considered a valid defense. This Court has historically held an insured to have knowledge of the contents of the policy, in the absence of fraud, even though the insured did not read it. See *Cleaver v Traders' Ins Co*, 65 Mich 527; 32 NW 660 (1887); *Wierengo v American Fire Ins Co*, 98 Mich 621; 57 NW 833 (1894); *Snyder v Wolverine Mut Motor Ins Co*, 231 Mich 692; 204 NW 706 (1925); *Serbinoff v Wolverine Mut Motor Ins Co*, 242 Mich 394; 218 NW 776 (1928); *House v Billman*, 340 Mich 621; 66 NW2d 213 (1954). Additionally, the Commissioner is precluded from approving an insurance policy that fails to obtain a prescribed "readability score" as set forth in MCL 500.2236(3).

The term "adhesion contract" may, as Professor Patterson originally intended, be used to describe a contract for goods or services offered on a take-it-or-leave-it basis. But it may not be used as a justification for creating any adverse presumptions or for failing to enforce a contract as written. To the extent that *Herweyer* held to the contrary, it is overruled.[83]

In this case, plaintiffs do not argue that they were fraudulently induced to sign their agreement with defendant, that they entered into the contract under duress, or that any other traditional contract defense applies.[84] Therefore, irrespective of whether their contract is labeled "adhesive" under Kessler's standard, the competing *Morris* standards, or any other definition of

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[83] Justice Kelly believes that overruling *Herweyer* represents a "radical change of the law," and that this Court should continue to "right the wrongs of adhesion contracts." *Post* at 27. However, as stated previously, the dissent overlooks the fact that *Herweyer* created a "radical change of the law" in Michigan.

[84] Justice Kelly suggests that there is never a meeting of the minds with a standardized form contract "[i]f the consumer does not read and comprehend the individual clauses of the contract . . . ." *Post* at 23. If this is indeed the case, then *no contract exists at all*. See *Quality Products*, *supra* at 372 ("Where mutual assent does not exist, a contract does not exist.") If the contract does not exist, there is nothing for a court to "revise."

the term, we must enforce the plain language of that agreement.[85]

IV. Conclusion

Consistent with our prior jurisprudence, unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy. Judicial determinations of "reasonableness" are an invalid basis upon which to refuse to enforce unambiguous contractual provisions. Traditional defenses to enforcement of the contract at issue, such as waiver, fraud, or unconscionability, have neither been pled nor proven. Moreover, nothing in our law or public policy precludes the enforcement of the contractual provision at issue. Finally, in the specific arena of insurance contracts, the Legislature has enacted a mechanism whereby policy provisions may be scrutinized and rejected on the basis of reasonableness. This responsibility, however, has been explicitly assigned to the Commissioner. The Commissioner has approved the policy form at issue.

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[85] We are at a loss to understand Justice Weaver's dissent. Nothing in this opinion breaks new ground. Justice Weaver's objection to the proposition that an insurance contract be enforced in accordance with its plain terms, just as any other contract, is a proposition found in *Raska*, *Wilkie*, and *Klapp*, *supra*. We do not purport to address the laundry list of issues raised in her dissent.

Plaintiffs have not challenged in the appropriate forum that this action was an abuse of discretion.

Accordingly, we reverse the Court of Appeals decision and remand for entry of summary disposition in favor of defendant.

Robert P. Young, Jr.
Clifford W. Taylor
Maura D. Corrigan
Stephen J. Markman

S T A T E O F M I C H I G A N

SUPREME COURT

SHIRLEY RORY and ETHEL WOODS,

Plaintiffs-Appellees,

v No. 126747

CONTINENTAL INSURANCE COMPANY,
also known as CNA INSURANCE COMPANY,

Defendant-Appellant.

KELLY, *J.* (*dissenting*).

I dissent today because the majority has come to what I believe to be the incorrect conclusion on nearly every count. Not only does it reach the wrong result in this case, it takes a drastic step in the wrong direction with respect to contract law in general. The majority's decision constitutes a serious regression in Michigan law, and it gives new meaning to the term "judicial activism." Therefore, I cannot let it pass without comment.

It is a legitimate exercise for courts to review the reasonableness of contractual clauses that limit the period during which legal actions can be brought. Courts have conducted reviews of this type for well over a century. These reviews constitute a necessary step in ensuring

accurate enforcement of the intent of parties to a contract.

Moreover, in deciding this case, it is unnecessary to reach the issue of adhesion contracts. Yet the majority does so, apparently using this dispute as a vehicle to reshape the law on adhesion contracts more closely to its own desires. I believe that the scrutiny and protections offered by traditional adhesion contract law offer appropriate safeguards for the people of this state. Therefore, I would leave that law unmolested and would affirm the decision of the Court of Appeals.

I. The Long History of Judging Limitations Periods for Reasonableness

The majority opinion includes an extensive discussion of what its author believes to be the history of the "reasonableness doctrine" in Michigan. It effectively concludes that this Court created new law when it evaluated a shortened limitations period for reasonableness in *Herweyer v Clark Hwy Services*, 455 Mich 14, 20; 564 NW2d 857 (1997), *Armand v Territorial Constr, Inc*, 414 Mich 21, 27-28; 322 NW2d 924 (1982), *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981), and *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976). This is not accurate.

It has long been the law that all limitations periods are subject to judicial review for reasonableness. Statutes of limitations enacted by the Legislature must be subject to such review. "Generally speaking, the time determined by the legislature within which an action may be brought is constitutional *where it is reasonable*." 54 CJS, Limitations of Actions, § 5, p 23. (Emphasis added.) This Court recognized and applied this rule more than 140 years ago when it wrote:

> [T]he legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away. . . . It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought[,] and a statute that fails to do this cannot possibly be sustained as a law of limitations . . . . [*Price v Hopkin*, 13 Mich 318, 324-325 (1865) (citations omitted).]

The essential reasoning behind this rule is that an unreasonable limitations period offers an aggrieved party no recourse to the courts. And it unfairly divests that party of a right that it supposedly provided. 54 CJS, Limitations of Actions, § 5, p 24.

For almost 140 years, this same rule and reasoning were applied to limitations periods created both by a contract and by a statute.

> [P]arties to a contract may, by an express provision therein, provide another and different period of limitation from the provided statute, and . . . such limitation, if reasonable, will be binding and obligatory upon the parties. [1 Wood, Limitation of Actions (4th ed, 1916), § 42, p 145.]

This rule of law was generally accepted and widely cited by courts throughout the country. See *Longhurst v Star Ins Co*, 19 Iowa 364, 370-371 (1865), *Gulf, C & S F R Co v Trawick*, 68 Tex 314, 319-320; 4 SW 567 (1887), *Gulf, C & S F R Co v Gatewood*, 79 Tex 89, 94; 14 SW 913 (1890), *Sheard v United States Fidelity & Guaranty Co*, 58 Wash 29, 33-34; 107 P 1024 (1910), *Pacific Mut Life Ins Co v Adams*, 27 Okla 496, 503; 112 P 1026 (1910), *Fitger Brewing Co v American Bonding Co of Baltimore*, 127 Minn 330; 149 NW 539 (1914), *Gintjee v Knieling*, 35 Cal App 563, 565-566; 170 P 641 (1917), *Columbia Security Co v Aetna Accident & Liability Co*, 108 Wash 116, 120; 183 P 137 (1919), and *Page Co v Fidelity & Deposit Co of Maryland*, 205 Iowa 798; 216 NW 957 (1927).

The United States Supreme Court discussed a similar topic well over a century ago. In *Express Co v Caldwell*,[1] the Court considered a common carrier's right to enter into

[1] 88 US (21 Wall) 264; 22 L Ed 556 (1875).

a contract to limit its liability.[2] It held that, while a common carrier could enter into such a contract, courts could review the contract provision for reasonableness. This review was deemed essential because carriers were in a position of advantage over members of the public requiring their service. *Express Co, supra* at 267.

In 1865, the Iowa Supreme Court used similar reasoning when it subjected contractual limitations periods to a reasonableness review. The court was asked to enforce a twelve-month limitations period under circumstances in which the necessary facts to bring a claim could not reasonably have been ascertained in twelve months. It refused, saying that to do so would impute a dishonest purpose to the company. *Longhurst, supra* at 371.

> By putting this construction upon the contract of insurance, you preserve the upright intent of the company intact. Whereas if you put the other construction upon it, you, by implication, charge, or perhaps it would be better to say, judicially determine, that the company granted a policy for a valuable consideration paid, which at the time, they had reason to believe, would be no risk to them and no protection to the insured, and thereby obtained money for themselves under false pretenses. True charity thinketh no evil. It is therefore right for us to presume, that it was the honest intent of the company, to insure the

[2] Under common law, a common carrier would act as an insurer against all loss or damage except that stemming from an act of God or "the public enemy." *Id.* at 266.

> plaintiff's mechanic's lien upon the premises specified, against loss by fire, and, upon the other hand, that it was the expectation of the insured, in paying the required premium, that his policy would cover the loss and give him the requisite protection. [*Id.*]

From these cases, one can see that the reasonableness doctrine is far from a novel legal idea. It has a solid foundation well recognized by the courts of this country, most notably the United States Supreme Court.

Also from these cases, the necessity of having such a review becomes apparent. Courts have recognized that insurers are in a position of power and control over the people purchasing their product. Careful judicial review is imperative so that the power is not abused. *Express Co*, *supra*; *Longhurst*, *supra*. Moreover, this review is essential in order to accurately implement the intent of the contracting parties. Because the overriding intent of a contract of insurance is to provide protection, the contract should not be read so as to eliminate that protection unreasonably.[3] *Id.*; *Spaulding* v *Morse*, 322 Mass

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[3] The majority argues that the best way to discern the intent of the parties is by using the language contained in the contract. But in truth, the majority's decision today indicates that this is the *only* way to discern their intent. I simply disagree, as does the majority of modern courts. As the great Learned Hand stated, "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than (continued…)

149, 152-153; 76 NE2d 137 (1947). Otherwise, the insurer would collect money without providing coverage.

Hence, application of the reasonableness rule of contractual construction is well founded and reasoned. And Michigan courts following this rule have wisely joined the general trend of all courts in this country. Rather than creating new law or diverting from established contractual interpretation principles, our Court in *Camelot* applied a very old and well tested legal rule.[4]

II. Modern Courts Discussion of the Issue at Hand

The long-established rule that courts review contractual limitations periods for their reasonableness has not been abandoned in modern times. In fact, several state courts have faced the very issue presented in this

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(…continued)
to read the words literally, forgetting the object which the document as a whole is meant to secure." *Central Hanover Bank & Trust Co v Comm'r of Internal Revenue*, 159 F2d 167, 169 (CA 2, 1947). I believe that courts should give effect to the actual intent of the parties as expressed through the document as a whole. The protections contracted for should not be unreasonably eliminated.

[4] It is true that cases decided before *Tom Thomas* and *Camelot* upheld contractual limitations periods without discussing reasonableness. But this does not mean that Michigan courts "eschewed" the principle. Likely, the issue was not raised in those cases. When Michigan courts had the issue actually before them, they followed the well-tested legal rule established by courts throughout the United States legal system, including by the Supreme Court.

case. Nearly every court that has considered an uninsured motorist insurance contract that limits the applicable statutory period of limitations has found the limitation unreasonable.

For example, in *Elkins v Kentucky Farm Bureau Mut Ins Co*,[5] the insurance contract limited an uninsured motorist claim to one year following the accident. This conflicted with the two-year statutory period of limitations for claims against a motorist. *Id.* The Kentucky court found the one-year limitations period unreasonable and refused to enforce it. It stated:

> [I]t makes no sense to allow two years (or more) to file a suit against an uninsured or underinsured tort-feasor and yet permit the insurer to escape liability if the suit involving it is not filed within one year. Such would not only be an unreasonably short time, but it would completely frustrate the no-fault insurance scheme. [*Id.* at 424.]

The Kentucky court noted that it was following the majority of courts that have ruled on the issue. See *Scalf v Globe American Cas Co*, 442 NE2d 8 (Ind App, 1982); *Sandoval v Valdez*, 91 NM 705; 580 P2d 131 (1978); *Signal Ins Co v Walden*, 10 Wash App 350; 517 P2d 611 (1973); *Burgo v Illinois Farmers Ins Co*, 8 Ill App 3d 259; 290 NE2d 371

[5] 844 SW2d 423 (Ky App, 1992).

(1972); *Nixon v Farmers Ins Exch*, 56 Wis 2d 1; 201 NW2d 543 (1972).

Therefore, the majority today has not only rejected the long-established rule regarding review for reasonableness, but it has also broken company with the majority of courts addressing the issue. This fact strongly suggests that the majority is not on the firm legal ground it claims. Rather, it is pushing Michigan law out on a tenuous ledge, distancing it from the law of our sister states.

III. The Limitations Provision Under Review was Unreasonable

Given that the "reasonableness doctrine" has been so well established, it should be applied without hesitation to the facts of this case. A review of the facts demonstrates the shocking inequity of the one-year limitations provision in defendant's uninsured motorist insurances contract.

The section of the contract in question provides:

> We will pay compensatory damages which any *covered person* is legally entitled to recover from the owner or operator of an *uninsured motor vehicle* because of *bodily injury*:
>
> 1. Sustained by any *covered person;* and
>
> 2. Caused by an *accident* arising out of the ownership, maintenance or use of an *uninsured motor vehicle;*

> Claim or suit must be brought within 1 year from the date of the *accident*. [Emphasis in original.]

This Court in *Herweyer* articulated the three-pronged test for determining if a limitations clause is reasonable:

> It is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained. [*Herweyer*, *supra* at 20, citing *Camelot*, *supra*.]

All prongs of the test outlined in *Camelot* and *Herweyer* weigh against allowing a shortened limitations period in this case.

Plaintiffs did not have sufficient time to investigate and file an action. Under the contract, the liability for uninsured motorist coverage is triggered only once an uninsured motorist becomes liable for noneconomic loss pursuant to MCL 500.3135(1). Liability for noneconomic loss occurs only if the plaintiffs suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). While death may be ascertainable at the time of the accident, the other two injuries are less readily identifiable.

A party may not know that his injury is permanent until considerable time elapses. During this time, he attends physical therapy and attempts to heal. This may

well take longer than a year. Quite often, an injured individual will do everything in his power to escape the label "permanently impaired." I believe that most individuals are willing to work for a living and will exert considerable effort to recover from an injury in order to return to work. The contractual limitation contained in defendant's insurance form discourages attempts at recovery. For these reasons, it is unreasonable and should be held to be against public policy.

Also, a party may not learn that he has a serious impairment until after one year has passed. Some injuries, especially soft tissue injuries, are difficult to diagnose. And proper diagnosis and determination of permanency may take a long time. The Legislature seems to have recognized this fact by enacting a three-year statutory period of limitations for bringing suits for noneconomic damages. Given these considerations, the first prong of the *Herweyer* test weighs against finding this limitation reasonable.

The one-year limitation also works as a practical abrogation of the right created by the insurance agreement. This is the second consideration under the *Herweyer* test. *Herweyer*, *supra* at 20. The best way that a plaintiff can find out if a party is uninsured is to sue him. If an insurance company presents a defense, then the party is

insured. However, the time required to reach this point can easily exceed one year.

Under a one-year period of limitations, an insured injured in an automobile accident would be forced to immediately ascertain whether a serious impairment exists. He then would be obliged to file suit against the other motorist well before one year has elapsed. This is because the case might have to progress through at least part of the discovery process for the injured person to determine if the other motorist is uninsured. Then, the insured would have to make a claim with his insurance company. In many instances, all this cannot be accomplished within one year.

The clause providing the one-year limitations period mandates that injured insureds bring suit immediately after their automobile accident. This might be even before they determine if they have a permanent impairment. In effect, the clause requires that baseless lawsuits be filed. Filing such a lawsuit might be the only way a party could claim the uninsured motorist coverage that he paid for. But this early filing still might not move the case along quickly enough to satisfy the one-year limitation.

This is exactly what happened to plaintiffs, Shirley Rory and Ethel Woods. They did not know that the other

party to the accident was uninsured until suit had been brought and discovery was underway. They did not delay in the least in making their claim with defendant. They filed well within the limitations period for claims of noneconomic damages. But the majority would still leave them without the uninsured motorist coverage they paid for. Clearly, this is a practical abrogation of plaintiffs' rights.

That the one-year limitations clause abrogates plaintiffs' rights becomes even clearer when one contemplates that an insurer for the third party might deny coverage well into the suit. That insurer could determine that its insured should not receive coverage only after defending him for many months. This delayed notice would be outside the control of the injured motorist. But it could deny him the uninsured motorist coverage he paid for from his own insurer. If a third-party insurer waits for a year to deny coverage, the clause would absolutely bar the injured motorist from the benefit of his insurance. The majority simply ignores this inequity.[6]

Also, after one year, the injured party may still be receiving medical treatment. A permanent injury may not

[6] Some would see this ruling as an open invitation for insurance company gamesmanship.

yet have been diagnosed. A third-party insurance company could deny coverage at that point. The injured motorist would have done everything in his power to bring suit against the third party. But he would not be able to sustain a claim under his uninsured motorist insurance policy because the third-party insurer did not deny coverage until too late. The contractual limitations clause simply fails to give an adequate period in which to ascertain the loss or damage. *Id.*

Given that the clause providing a one-year limitations period is found wanting under all three prongs of the *Herweyer* test, it must be adjudged to be unreasonable. *Id.* Therefore, the trial court correctly denied summary disposition in this case and the Court of Appeals appropriately affirmed that decision.

IV. The One-Year Limitations Period and MCL 500.2254

The majority concludes that the one-year limitations clause is not contrary to the law or to public policy. But to reach this conclusion, it relies on a strained reading of MCL 500.2254. I agree with the Commissioner of the Office of Financial and Insurance Services who filed an amicus curiae brief concluding that MCL 500.2254 forbids a one-year limitations clause.

MCL 500.2254 provides:

> Suits at law may be prosecuted and maintained by any member against a domestic insurance corporation for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become due. *No* article, bylaw, resolution or *policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in this state:* Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant. [Emphasis added.]

Under the language of this statute, a policy provision may not prohibit a beneficiary from commencing and maintaining a suit. MCL 500.2254. But this is exactly what the one-year limitations clause does. After expiration of the one-year period, the beneficiary no longer is entitled to maintain a suit for uninsured motorist coverage, even though his claim is allowable by statute for another two years. The limitations clause contravenes the statute. This means it is contrary to Michigan law and Michigan public policy.

In order to support its position, the majority argues that nothing in the statute forbids conditions being placed on the commencement and maintenance of a lawsuit. But such conditions are exactly what the statute speaks of. It forbids a policy provision "*prohibiting a member or beneficiary from commencing and maintaining suits*[.]" MCL 500.2254. Any "condition" in a policy would be a policy provision. Changing its label does not change what it is. Therefore, any condition prohibiting a beneficiary from commencing and maintaining a suit would equally violate the statute.[7]

In addition, the Legislature explicitly lists two "conditions" that are exceptions to the general rule in MCL 500.2254. Insurance companies may include in their policy provisions these two "conditions": (1) the claimant must exhaust any alternative remedies mandated by the policy, such as arbitration, and (2) the claimant must give the insurer six months to decide whether to honor the claim before the claimant may bring suit. MCL 500.2254. The

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[7] The majority claims that my interpretation would render invalid a contractual limitations period that paralleled the applicable statutory limitations period. This is not true. In such a situation, the contractual provision would not limit the commencement and maintenance of a lawsuit, but instead, the statute of limitations would.

inclusion of these two conditions indicates that the Legislature did not intend to allow any others.

This Court has long relied on the legal maxim *expressio unius est exlusio alterius*.[8] The maxim is a rule of construction that is a product of logic and common sense. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. In fact, this Court long ago stated that no maxim is more uniformly used to properly construe statutes. *Taylor v Michigan Pub Utilities Comm*, 217 Mich 400, 403; 186 NW 485 (1922).

If exceptions such as the one-year limitations clause were permissible, it would be pointless for the Legislature to have listed only two exceptions in the statute. It would contravene the well established maxim of *expressio unius est exlusio alterius*. And it would write into the statute what the Legislature chose to omit. Therefore, I cannot agree with the majority's interpretation of MCL 500.2254.

V. Approval of Insurance Forms by the Commissioner

The majority argues that the Legislature assigned the task of evaluating an insurance provision's reasonableness

[8] This translates as "the expression of one thing is the exclusion of another."

to the Commissioner of the Office of Financial and Insurance Services. It relies on MCL 500.2236(5), which provides:

> Upon written notice to the insurer, the commissioner *may* disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately. [Emphasis added.]

By using the term "may," the Legislature has signaled that what follows "may" is a discretionary act. This contrasts with the use of the term "shall," which signals a mandatory act. *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 100; 523 NW2d 310 (1994). Nothing in this statute indicates that, in granting this discretion to the commissioner, the Legislature intended to rob the courts of review of the same matter.[9] Moreover, it could be argued

[9] The majority accuses me of reading the review of policy forms as discretionary. That is not my argument. (continued…)

that, by not making the commissioner's review mandatory, the Legislature acknowledged that a court's exercise of similar review is well-founded and appropriate.

The majority ignores the discretionary nature of the commissioner's review when it concludes that plaintiffs can challenge the one-year limitations clause only by challenging the approval of the insurance form. But the commissioner is not required to review "conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy." MCL 500.2236(5).

The majority's argument amounts to little more than a red herring. It is an attempt to distract from the patent inequity of its ruling today. Because the commissioner's review is discretionary, reference to MCL 500.2236(5) adds little to this discussion. And it does not justify the majority's decision to radically change existing law.

(…continued)
While the commissioner is required to review all forms, the discretionary nature of his disapproval means that his review for reasonableness is also discretionary. The statute would allow the commissioner to let a form enter into use even if he found terms within it to be unreasonable. The statute does not mandate disapproval when a portion of the form is unreasonable. Therefore, the review for reasonableness is discretionary.

VI. Adhesion Contracts

Not content with overturning just one line of precedent used to protect the people of Michigan, the majority goes on to discuss the tangentially related topic of adhesion contracts. It overrules the line of cases offering protection to Michiganians from such contracts and departs from well-established precedent and from the majority of other courts that have addressed the issue. Its decision also defies common sense.

A. The History of Adhesion Contracts and Balancing the Inequities of These Contracts

In discussing the history of adhesion contracts, the majority misses one important point. Before courts applied protections from adhesion contracts, they struggled to deal with the problems presented by form contracts.[10] Although they did not always explicitly state what they were doing, they often acted in a way to balance out the inequities presented by such contracts.

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[10] I would note that form contracts came into use only toward the end of the eighteenth century. Meyerson, *The reunification of contract law: The objective theory of consumer form contracts*, 47 U Miami L R 1263 (1993). Relatively speaking, it was a short time before there was discussion of treating them as contracts of adhesion. During the intervening time, courts found other ways to counterbalance the inequities of these one-sided contracts.

In his early work in the field, Professor Karl N. Llewellyn noted:

> [W]e have developed a whole series of semi-covert techniques for somewhat balancing these [form-contract] bargains. A court can "construe" language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one side for want of "mutuality," though allowing enforcement by the weaker side because "consideration" in some other sense is present. [Book review, *The standardization of commercial contracts in English and Continental Law, by O. Prausnitz*, 52 Harv L R 700, 702 (1939).][11]

Courts have long recognized the inherent problems of form contracts and attempted through various methods to compensate for their inequities. The great legal minds of the early twentieth century began to see the drawbacks of this "semi-covert" action, and they called for uniformity in the field. From this developed the concept and protections of the adhesion contract theory. Meyerson, *The reunification of contract law: The objective theory of consumer form contracts*, 47 U Miami L R 1263, 1277-1278 (1993).

Despite the majority's argument, the idea of balancing the inequities of form contracts (or what are now more

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[11] See also Keeton, *Insurance law rights at variance with policy provisions*, 83 Harv L R 961, 968-973 (1970).

commonly known as "adhesion contracts") has been long recognized. And there is good reason for this longstanding recognition. Namely, the bargained-for exchange fundamental to traditional contracts simply does not exist in adhesion contracts.

As the Pennsylvania Supreme Court noted when abandoning the strict construction approach to which the majority regresses today:

> The rationale underlying the strict contractual approach reflected in our past decisions is that courts should not presume to interfere with the freedom of private contracts and redraft insurance policy provisions where the intent of the parties is expressed by clear and unambiguous language. We are of the opinion, however, that this argument, based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive. Such a position fails to recognize the true nature of the relationship between insurance companies and their insureds. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured. The only aspect of the contract over which the insured can "bargain" is the monetary amount of coverage. [*Brakeman v Potomac Ins Co*, 472 Pa 66, 72; 371 A2d 193 (1977).]

The average person does not sit down and bargain for each of the terms in his insurance contract. Quite the opposite is true. He may never read his insurance policies. Most are long and contain nuanced subclauses virtually indecipherable to people not experienced in

contractual interpretation or insurance law. This is true despite the increased use of plain English in such policies. In most situations, the individual pays his insurance premiums and then receives the contract in the mail days or weeks later. Most people simply do not have the opportunity, time, or special ability to read the policy before agreeing to it.

And what incentive does the insurance industry have to assure that their insureds read their polices? If people were to read all the language in their insurance contracts, the insurance providers would be flooded with questions and requests to change clauses. It has been observed that "[i]f it is both unreasonable and undesirable to have consumers read these terms, courts should not fashion legal rules in a futile attempt to force consumers to read these terms[.]" Meyerson, *supra* at 1270-1271.

If the consumer does not read and comprehend the individual clauses of the contract, there can be no agreement on the particular terms in them. There can be no meeting of the minds. Moreover, when one side presents a contract on a take-it-or-leave-it basis and is in a place of considerable power over the other, there can be no bargained-for exchange. Hence, an outdated strict

construction policy of construing these agreements is utterly unworkable.[12]

It is for that reason that the majority of the courts in this country has disavowed the strict construction policy in construing contracts of adhesion.[13] Instead, they

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[12] The majority contends that consumers should be assumed to know all the contents of their insurance policies. But it notes that without a meeting of the minds no contract exists. The purpose of modern judicial review of adhesion contracts is to balance the inequity that they present. Instead of either forcing a consumer to abide by a term that he never knew of or rejecting the entire contract, the court balances the inequities of the contract to enforce its overriding intent. Therefore, what was fairly bargained for is enforced and what the parties minds truly met on remains. But the majority, instead of continuing to balance these inequities, returns to the generally unworkable strict construction approach. In doing so, it ignores the true nature of adhesion contracts. *Brakeman, supra.*

[13] For but a few examples, see *Lechmere Tire & Sales Co v Burwick*, 360 Mass 718; 277 NE2d 503 (1972), *State Farm Mut Automobile Ins Co v Johnson*, 320 A2d 345 (Del, 1974), *Dairy Farm Leasing Co, Inc v Hartley*, 395 A2d 1135 (Me, 1978), *Jarvis v Aetna Cas & Surety Co*, 633 P2d 1359 (Alas, 1981), *State Farm Mut Automobile Ins Co v Khoe*, 884 F2d 401 (CA 9, 1989), *Jones v Bituminous Cas Corp*, 821 SW2d 798 (Ky, 1991), *Nieves v Intercontinental Life Ins Co*, 964 F2d 60 (CA 1, 1992), *Broemmer v Abortion Services of Phoenix, Ltd*, 173 Ariz 148; 840 P2d 1013 (1992), *Grimes v Swaim*, 971 F2d 622 (CA 10, 1992), *United States Fidelity & Guaranty Co v Sandt*, 854 P2d 519 (Utah, 1993), *Buraczynski v Eyring*, 919 SW2d 314 (Tenn, 1996), *Coop Fire Ins Ass'n v White Caps, Inc*, 166 Vt 355; 694 A2d 34 (1997), *Alcazar v Hayes*, 982 SW2d 845 (Tenn, 1998), *Andry v New Orleans Saints*, 820 So 2d 602 (La App, 2002), *Parilla v IAP Worldwide Services VI, Inc*, 368 F3d 269 (CA 3, 2004), and *Iberia Credit Bureau, Inc v Cingular Wireless LLC*, 379 F3d 159 (CA 5, 2004).

follow the more equitable and balanced modern trend of viewing adhesion contracts with skepticism. I believe it is a serious mistake for the majority to regress Michigan law away from this well-accepted modern trend that has been created to protect individuals.[14]

The majority contends that it bases its decision on the "freedom of contract and the liberty of each person to order his or her own affairs by agreement." *Ante* at 39. It also states that contracts "voluntarily and fairly made" should be enforced. *Ante* at 12. In making these statements, the majority either ignores or intentionally obfuscates the fact that adhesion contracts are not fairly made or bargained for by individuals managing their own affairs.

Instead, the majority is creating a rule that permits insurance companies to bargain *unfairly* so that they can maximize their financial profit. The burden of this rule

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[14] The majority accuses the *Herweyer* Court of being the true judicial activists. It claims that *Herweyer* rejected "a century" of precedent. As noted, earlier in this opinion, this truly is not the case. Courts had been balancing the inequities of form contracts nearly since their inception. This Court in *Herweyer* merely followed that trend. It is only this majority that is reshaping Michigan law and clearly reversing longstanding precedent. In doing so, it is ignoring the current state of contract law and breaking away from the well-established modern trend of adhesion contract interpretation recognized throughout this country.

is carried by the average individual who has little, if any, bargaining power when purchasing insurance. The choice made by the majority regresses our judicial system by decades, if not centuries. It places the state back into the era when courts either used covert means of interpreting contracts or ignored equity altogether.

B. The Continued Attack on Insurance Contract Protections

Today, the majority continues its attack on the well-developed protections created in insurance law that it started in *Wilkie v Auto-Owners Ins Co* 469 Mich 41; 664 NW2d 776 (2003). In *Wilkie*, the majority struck down, erroneously I believe, the doctrine of reasonable expectations. Adding this decision to *Wilkie*, the majority has now struck down all reasonable means of objectively interpreting insurance contracts. Without objective standards, courts cannot be expected to accurately discern the intent of the parties.

> An objective standard produces an essential degree of certainty and predictability about legal rights, as well as a method of achieving equity not only between insurer and insured but also among different insureds whose contributions through premiums create the funds that are tapped to pay judgments against insurers. [Keeton, *Insurance law rights at variance with policy provisions*, 83 Harv L R 961, 968 (1970).]

The abandonment of these important equitable considerations destabilizes the system. The only ones

benefited are the insurance companies. Those that are unscrupulous can now more easily create deliberately confusing insurance forms with hidden clauses that change the meaning of the policy. They may thereby collect payments for coverage that is wholly illusory without worry of interference from Michigan courts. I cannot agree with this position. As Justice Cavanagh once wisely stated:

> I object to [the majority's] attempt to distance itself from the policy choices inherent in its decision today. Simply put, the majority and I differ with regard to the policies that should guide the interpretation of insurance law. I would prefer not to disregard the manner in which the insurance industry operates. Though an adhesion contract may be a necessary ingredient in the trade, I cannot condone a doctrine of interpretation that all but ignores the potentially precarious effect on the bound party. [*Wilkie*, *supra* at 70 (Cavanagh, J., dissenting).]

This Court should not abandon the protections created to right the wrongs of adhesion contracts. I must dissent from its radical change of the law.

VII. Conclusion

The reasonableness doctrine is well-established in the law. Judicial review constitutes a necessary step to ensure that the actual intent of parties to a contract is enforced. Therefore, it is inappropriate to overturn the various decisions that support the ability of courts to

review for reasonableness the shortening of limitations periods.

In this case, the one-year time limit was so short that it acted as a practical abrogation of the right to bring a lawsuit. Therefore, plaintiffs paid for coverage from which they could never benefit. In such a situation, the only proper action by the Court is to find the limitations period unreasonable.

In deciding this case, it is unnecessary to reach the issue of adhesion contracts. The majority, by venturing into this area of the law and using this case as a vehicle, subjects itself to claims that it engages in judicial activism. The scrutiny and protections offered by traditional adhesion contract law offer a necessary aegis for the people of this state. I see no reason to attack this fundamental tenet of our law.

Therefore, I would affirm the decision of the Court of Appeals.

Marilyn Kelly

S T A T E O F M I C H I G A N

SUPREME COURT

SHIRLEY RORY AND ETHEL WOODS,

Plaintiffs-Appellees,

v No. 126747

CONTINENTAL INSURANCE COMPANY,
also known as CNA INSURANCE COMPANY,

Defendant-Appellant.

CAVANAGH, J. (*dissenting*).

As the majority accurately observes, this Court is faced with a choice today. See *ante* at 39. This Court could continue to acknowledge the unique character of insurance agreements and follow well-reasoned precedent examining contractually shortened limitations periods for reasonableness. Or this Court could disregard the manner in which insurance agreements come into existence and abrogate the "reasonableness doctrine." Because the majority makes the wrong choice, I must respectfully dissent from today's decision and concur in the result reached by Justice Kelly's dissent.

As a general proposition, "[a]n insurance policy is much the same as any other contract." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

Accordingly, a clear and unambiguous insurance policy is usually applied as written. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965); *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). This general principle, however, is subject to numerous caveats that are deeply rooted in our jurisprudence, including the following: where a contractual limitations provision shortens the otherwise applicable period of limitations, the provision must be reasonable to be enforceable. *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 20; 564 NW2d 857 (1997). See also 44A Am Jur 2d, Insurance, § 1909, p 370; anno: *Validity of contractual time period, shorter than statute of limitations, for bringing action*, 6 ALR3d 1197.

As noted by the majority, there is little doubt that parties may generally contract for shorter periods of limitations, and this Court has enforced such provisions where they have been reasonable. To this end, this Court in *Herweyer*, *supra* at 20, rearticulated the following factors to assist our courts in determining whether a contractual limitations provision is reasonable:

> It is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and

> (3) the action is not barred before the loss or damage can be ascertained.

In my view, this reasonableness inquiry is particularly fitting when insurance policies purport to shorten the otherwise applicable period of limitations. As Justice Levin once observed:

> The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.
>
> In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable. [*Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 141; 301 NW2d 275 (1981) (Levin, J., concurring).]

Nonetheless, the majority posits that the reasonableness inquiry no longer has any place in our jurisprudence because this inquiry undermines the parties' freedom of contract. In my view, however, such an approach ignores the manner in which the insurance industry operates. In this regard, I believe that the majority's approach is based on the fiction that the shortened

limitations period was a truly bargained-for term.[1] In other words, I believe that the majority's entire premise must fail because it ignores the unique character of insurance agreements and disregards the notion that adhesion contracts inherently tend to "be a necessary ingredient in the trade . . . ." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 70; 664 NW2d 776 (2003) (Cavanagh, J.,

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[1] In the typical insurance agreement, Justice Levin prudently noted,

> [t]here is no meeting of the minds except regarding the broad outlines of the transaction, the insurer's desire to sell a policy and the insured's desire to buy a policy of insurance for a designated price and period of insurance to cover loss arising from particular perils (death, illness, fire, theft, auto accident, "comprehensive"). The details (definitions, exceptions, exclusions, conditions) are generally not discussed and rarely negotiated.
>
> The policyholder can, of course, be said to have agreed to whatever the policy says—in that sense his mind met with that of the insurer. Such an analysis may not violate the letter of the concept that a written contract expresses the substance of a meeting of minds, but it does violate the spirit of that concept.
>
> To be sure, contract law principles are not confined by the concept of a "meeting of the minds." Nevertheless, a point is reached when the label "contract" ceases to fully and accurately describe the relationship of the parties and the nature of the transaction between insurer and insured. [*Lotoszinski v State Farm Mut Automobile Ins Co*, 417 Mich 1, 14 n 1; 331 NW2d 467 (1982) (Levin, J., dissenting).]

dissenting).[2] Accordingly, I would not torture the term "adhesion contract" and turn a blind eye to the manner in which these adhesion contracts are made simply to bolster what is perceived as a preferred result. Instead, I would embrace, rather than divorce, reality and acknowledge how insurance policies typically come into existence. Therefore, I would affirm the decision of the Court of

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[2] I must additionally note that, contrary to the majority's rationale, decisions such as *Camelot Excavating*, *Herweyer*, and *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976), were not groundbreaking. For example, 44A Am Jur 2d, Insurance, § 1909, pp 370-371 provides:

> In the absence of statutory regulation to the contrary, an insurance contract may validly provide for a limitation period shorter than that provided in the general statute of limitations, *provided that the interval allowed is not unreasonably short*. [Emphasis added.]

Section 1909 cites the following cases in support of this view: *Thomas v Allstate Ins Co*, 974 F2d 706 (CA 6, 1992) (applying Ohio law); *Doe v Blue Cross & Blue Shield United of Wisconsin*, 112 F3d 869 (CA 7, 1997); *Wesselman v Travelers Indemnity Co*, 345 A2d 423 (Del, 1975); *Phoenix Ins Co v Aetna Cas & Surety Co*, 120 Ga App 122; 169 SE2d 645 (1969); *Nicodemus v Milwaukee Mut Ins Co*, 612 NW2d 785 (Iowa, 2000) (contractual limitations provision in an insurance policy is enforceable if it is reasonable); *Webb v Kentucky Farm Bureau Ins Co*, 577 SW2d 17 (Ky App, 1978); *Suire v Combined Ins Co of America*, 290 So 2d 271 (La, 1974); *L & A United Grocers, Inc v Safeguard Ins Co*, 460 A2d 587 (Me, 1983) (in property insurance, a limit of one year from the time of loss is not unreasonably short); *O'Reilly v Allstate Ins Co*, 474 NW2d 221 (Minn App, 1991); *Commonwealth v Transamerica Ins Co*, 462 Pa 268; 341 A2d 74 (1975); *Donahue v Hartford Fire Ins Co*, 110 RI 603; 295 A2d 693 (1972); *Hebert v Jarvis & Rice & White Ins, Inc*, 134 Vt 472; 365 A2d 271 (1976).

Appeals and conclude that the shortened limitations period in this insurance policy is unreasonable and, thus, unenforceable.

I must also observe that my disagreement with the current majority with respect to the principles governing the interpretation of insurance policies is nothing new. See *Wilkie*, *supra*. I recognize that the majority's view in this case and others is theoretically consistent with the notion of freedom of contract. In the abstract, the majority's approach could arguably have some appeal. Nonetheless, while today's decision may placate the majority's own desire to demonstrate its self-described fidelity, I believe that the majority's position ignores how the insurance industry functions and discounts the effects today's decision will have on this state's citizens. Therefore, I must respectfully dissent from today's decision and concur in the result reached by Justice Kelly's dissent.

Michael F. Cavanagh

S T A T E O F M I C H I G A N

SUPREME COURT

SHIRLEY RORY and ETHEL WOODS,

Plaintiffs-Appellees,

v No. 126747

CONTINENTAL INSURANCE COMPANY,
also known as CNA INSURANCE COMPANY,

Defendant-Appellant.

WEAVER, J. (*dissenting*).

I respectfully dissent from the majority opinion's holdings that the "insurance policies *are* subject to the same contract construction principles that apply to any other species of contract," and that "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Ante* at 2.

In so holding, the majority is eliminating over five decades' worth of precedent that created specialized rules of interpretation and enforcement for insurance contracts. These specialized rules recognize that an insured is not able to bargain over the terms of an insurance policy; indeed, it is common practice for the insured to receive

the actual terms of the contract, the insurance policy itself, only *after* having purchased the insurance. Further, in most cases the average consumer will not read the policy; the consumer will rely on the agent's representations of what is covered in the policy. Even if the insured were to read the policy, insurance policies are not easy to understand and contain obscure provisions, the meaning of which requires legal education to grasp.

The longstanding rules that the majority does away with by stating that insurance contracts are to be interpreted in the same way as any other contract include:

•Courts must interpret insurance policies from the perspective of an average consumer. The contract must be read using the ordinary language of the layperson, not using technical medical, legal, or insurance terms.[1] By contrast, the usual rule of contract interpretation is that "technical terms and words of art are given their technical meaning when used in a transaction within their technical field." 2 Restatement Contracts, 2d, ch 9, § 202, p 86. See also *Moraine Products, Inc v Parke, Davis & Co*, 43 Mich App 210, 213; 203 NW2d 917 (1972).

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[1] "Insurance policies should be read with the meaning which ordinary layman would give their words." *Bowman v Preferred Risk Mut Ins Co*, 348 Mich 531, 547; 83 NW2d 434 (1957).

●If reading the contract one way provides that there is coverage, but reading it another way provides that there is not coverage under the same circumstances, then the contract is ambiguous and must be construed against its drafter and in favor of coverage.[2] This is different from general contract law, which finds a contract ambiguous "if its provisions may *reasonably* be understood in different ways." *Universal Underwriters Ins Co v Kneeland,* 464 Mich 491, 496; 628 NW2d 491 (2001). (Emphasis added.) The "reasonableness" requirement can be a severe limitation on finding an ambiguity.

●If a limitation on coverage is not expressed clearly enough to inform the insured of the extent of coverage

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[2] An ambiguity in an insurance policy is broadly defined to include contract provisions capable of conflicting interpretations. *Auto Club Ins Ass'n v DeLaGarza,* 433 Mich 208, 214; 444 NW2d 803 (1989).

"If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage." *Raska v Farm Bureau Mut Ins Co of Michigan,* 412 Mich 355, 362; 314 NW2d 440 (1982).

purchased, the provision is construed against the drafter, the insurance company.[3]

•In interpreting a policy, exceptions to general liability are to be strictly construed against the insurer.[4]

•The contract of insurance may include not only the written policy, but also the advertising and the application.[5] The general rule of contract interpretation,

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[3] When an insurer "has failed to clearly express a limitation on coverage so as to fairly apprise the insured of the extent of the coverage purchased, it is appropriate to construe the provision under consideration against its drafter." *Auto Club Ins Ass'n v DeLaGarza*, 433 Mich 208, 214-215; 444 NW2d 803 (1989).

[4] Technical constructions of insurance policies are not favored and exceptions to the general liability provided for in an insurance policy are to be strictly construed against the insurer. *Francis v Scheper*, 326 Mich 441, 448; 40 NW2d 214 (1949). Exclusion clauses in insurance policies are construed strictly against the insurer. *Century Indemnity Co v Schmick*, 351 Mich 622, 626-627; 88 NW2d 622 (1958).

[5] Where the advertising and the application stated that the policy would be in force as soon as the application and $1 for the first month's premium was received, but the policy was not issued until 18 days later, the Court held that the advertising and the application created an ambiguity about when the policy should go into effect. The Court construed this ambiguity in favor of the insured, stating:

> If there is any doubt or ambiguity with reference to a contract of insurance which has been drafted by the insurer, it should be construed most favorably to the insured. Under that rule the application and advertising in the case before us must be construed most favorably

(continued...)

in contrast, is that "[a]bsent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters, supra* at 496.

These specialized rules of interpretation protect the consumer buying insurance, especially no-fault insurance, which every automobile owner is required by law to purchase; they should not be so lightly swept aside with no discussion and without regard for five decades of precedent. For these reasons, I dissent and concur in the result of Justice Kelly's dissent.

Elizabeth A. Weaver

(…continued)

> to the insured. We construe this to mean the policy would be in effect without delay. [*Gorham v Peerless Life Ins Co*, 368 Mich 335, 343-344; 118 NW2d 306 (1962) (citation omitted).]

EXHIBIT 7

Smith v. Globe Life Ins. Co.

Supreme Court of Michigan

January 2, 1999, Argued ; July 13, 1999, Decided ; July 13, 1999, Filed

No. 110065

Reporter
460 Mich. 446 *; 597 N.W.2d 28 **; 1999 Mich. LEXIS 1894 ***

DEBRA L. SMITH, personal representative of the estate of ROBERT A. SMITH, deceased, Plaintiff-Appellee, v GLOBE LIFE INSURANCE COMPANY, Defendant-Appellant.

Prior History: [*1]** Kent Circuit Court, Donald A. Johnston, J., Court of Appeals, GRIBBS, P.J. and MARKEY, J. and T. G. KAVANAGH, J. (Docket No. 177201).

Disposition: Affirmed in part and reversed in part and remanded to the trial court for further proceedings.

Case Summary

Procedural Posture
Defendant insurer appealed the decision of the Kent Circuit Court of Appeals (Michigan), which reversed summary disposition in favor of the insurer in plaintiff beneficiary's action to recover the proceeds allegedly due under a life insurance policy.

Overview

The insured misrepresented the condition of his health on the application for the life insurance policy by stating that he did not have a heart condition. He later died of a heart attack. The insurer denied the payment of proceeds under the policy to the beneficiary because of the insured's misrepresentation, and the beneficiary sued the insurer for breach of contract. On appeal, the court reversed the appellate court's decision in part by holding that the insurer was entitled to summary judgment on the breach of contract claim. The court explained that because the evidence established that the insured made a misrepresentation that materially affected the hazard assumed under the policy, the insurer was entitled to avoid payment under the policy pursuant to *Mich. Comp. Laws § 500.2218* without having to establish that it actually relied on the misrepresentation. However, the court agreed with the appellate court that the insurer was not entitled to summary judgment on claims that it violated the Michigan Consumer Protection Act, *Mich. Comp. Laws § 445.901 et seq.* The court held that the insurer was subject to a private action pursuant to *Mich. Comp. Laws § 445.911* of the Act.

Outcome
The court reversed the appellate court's decision on the breach of contract claim and reinstated the trial court's order that granted summary judgment to the insurer on that claim. The court affirmed the appellate court's decision to the extent of holding that the insurer was not entitled to summary disposition of the claims made under the Michigan Consumer Protection Act. The court remanded the case to the trial court for further proceedings.

Counsel: Murray, Pawlowski & Flakne, L.L.P. (by Susan B. Flakne), Grand Rapids, MI, for plaintiff-appellee.

Honigman, Miller, Schwartz & Cohn (by Sandra L.

EXHIBIT 7

Jasinski), Lansing, MI, for defendant-appellant.

Amicus Curiae:

Butzel, Long (by David H. Oermann and Norman A. Yatooma), Birmingham, MI, for Life Insurance Association of Michigan.

Judges: BEFORE THE ENTIRE BENCH. Chief Justice Elizabeth A. Weaver, Justices James H. Brickley, Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr. WEAVER, C.J., and BRICKLEY, TAYLOR, and CORRIGAN, JJ., concurred with YOUNG, J. KELLY, J. (concurring in part and dissenting in part). CAVANAGH, J. (concurring in part and dissenting in part).

Opinion by: Robert P. Young, Jr.

Opinion

[*448] **[**30]** Opinion

YOUNG, J.

This case involves a dispute regarding defendant insurer's avoidance of a credit life and disability insurance policy on the ground that the insured **[*449]** made misrepresentations **[***2]** concerning his health on the application.

We granted leave in this case to determine whether defendant Globe Life Insurance Company is entitled to summary disposition with regard to plaintiff Debra L. Smith's complaint alleging: (1) breach of contract involving the credit life and disability insurance policy, and (2) violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 et seq.; MSA 19.418(1) *et seq.*, concerning the manner in which defendant represented the benefits and conditions of the policy in question.

Reversing the Court of Appeals in part, we conclude that defendant is entitled to summary disposition regarding plaintiff's breach of contract claim. Defendant's evidence established that plaintiff's deceased father, Robert Smith, made material misrepresentations in his insurance application. Contrary to the Court of Appeals conclusion, there is no genuine issue of material fact regarding the application's authenticity. In addition, defendant was not required to establish that it issued the insurance policy in reliance on Smith's misrepresentations.

However, we agree with the Court of Appeals that defendant is not entitled to **[***3]** summary disposition regarding its alleged violations of the Michigan Consumer Protection Act. Although § 4(1)(a) of the act generally exempts from the MCPA transactions that are "specifically authorized" **[**31]** by law, § 4(2) provides an exception to that exemption by permitting certain private actions to be brought pursuant to § 11. That exception is applicable to plaintiff's claim.

Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals.

[*450] I. Factual and Procedural Background

On December 4, 1992, plaintiff's deceased father, Robert Smith, bought a new truck financed through Ford Motor Credit Company (FMCC). At the time, Smith was forty-seven years old and employed full-time. As part of his financing package, he purchased a combined credit life and disability policy issued by defendant. Only the credit life insurance policy is at issue here. The certificate of insurance provided the following eligibility requirements:

Who is eligible for life insurance: On the Date of Debt you and any Co-Debtor must each: (i) owe the Debt; (ii) be fully capable of being actively at work for wages or profit at least 30 hours per week; and (iii) be less than 71 years **[***4]** old. At the end of the Term of Insurance, you and any Co-Debtor must each be less than 71 years old.

On Smith's application for insurance, slash marks had been made in boxes labeled "NO" as responses to the following inquiries:

1. Have you been medically diagnosed as having and are you receiving treatment for:

a. Any condition of the heart, brain, liver, kidney, lungs, cancer or any malignant growth?

b. Diabetes, high blood pressure, circulatory disorders, neurological disorders, mental disorders or disorders of the back or neck?

Above Smith's signature, the application also warned:

Answer all questions honestly and truthfully, misrepresentation is a basis for denial of benefits. Any underwriting decision based on this evidence of insurability shall be made within 60 days from the date of this application.

[*451] The credit life insurance policy provided in relevant part that defendant would be responsible for the balance due on the FMCC loan if Smith died while the policy was in force.

Smith had made two payments on the FMCC loan when he suffered a fatal heart attack on January 27, 1993. As personal representative of her father's estate, plaintiff notified defendant of Smith's **[***5]** death and made a claim for benefits pursuant to the certificate of insurance. Defendant denied coverage, asserting that the policy was void because Smith had misrepresented his state of health on the application. Defendant rescinded the policy, returning premiums paid for the policy to the car dealership.

After defendant denied the claim, plaintiff filed a complaint alleging breach of contract and violations of the Michigan Consumer Protection Act. [1] Relying on conditions of coverage provided in the certificate of insurance quoted above, count I alleged that defendant was aware that decedent met the conditions and denied his claim in bad faith. Count II alleged that defendant misrepresented the advantages, benefits, terms, and conditions of the insurance policy in violation of the MCPA.

In its motion for summary disposition, defendant claimed it would not have insured Smith had it been aware of his **[***6]** true medical background. In support of its motion, defendant submitted: (1) a copy of Smith's application revealing negative responses to the aforementioned health inquiries, (2) medical records establishing Smith had been diagnosed with coronary heart **[*452]** disease in 1986 and was being treated for this condition at the time of his death, (3) interrogatory responses establishing **[**32]** Smith was an insulin-dependent diabetic, and (4) an affidavit by a former underwriter who claimed defendant would have denied the certificate of insurance had it been aware of Smith's condition at the time he applied for coverage.

Opposing the motion, plaintiff submitted an affidavit and claimed: (1) the slash marks through the "NO" responses were not in Smith's handwriting, and (2) defendant failed to proffer evidence establishing that it had received the insurance application when the insurance policy was issued. Plaintiff also claimed that she was not bound by any statements made in the application and that defendant was precluded from admitting the application into evidence because the application was not attached to plaintiff's certificate of insurance.

The trial court granted the motion for summary disposition **[***7]** pursuant to MCR 2.116(C)(10). It concluded: (1) an insurer is not obligated to attach the application to the certificate of insurance, (2) Smith had not truthfully answered the application inquiries, and (3) the signature appeared authentic. The trial court noted that there was a question whether Smith authored the slash marks through the "NO" boxes on the application. However, the court concluded that the issue was "largely beside the point" because the answers appeared to be "adoptively [Smith's]."

Addressing the MCPA claims, the trial court concluded that the MCPA does not apply to activity regulated by the State Commissioner of Insurance, citing Kekel v Allstate Ins Co, 144 Mich App 379; 375 N.W.2d [*453] 455 (1985). Accordingly, the trial court dismissed plaintiff's complaint.

The Court of Appeals reversed. 223 Mich App 264, 266; 565 N.W.2d 877 (1997). It concluded that there was no genuine issue of material fact regarding the authenticity of Smith's signature. However, the Court held that a factual question existed regarding whether Smith had authored the slash marks through the "NO" boxes and whether defendant had **[***8]** received and relied on the application when issuing the policy.

Addressing whether defendant was exempt from the alleged violations of the MCPA, the Court of Appeals considered § 4(1)(a) of the act which provides:

This act does not apply to . . . the following:

(a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States. [MCL 445.904 (1)(a); MSA 19.419(4)(1)(a).]

It concluded that a "common-sense reading" of the language reveals that the Legislature did not intend to

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[1] MCL 445.903(1)(g), (n), (s), (bb), (cc); MSA 19.418(3)(1)(g), (n), (s), (bb), (cc).

exempt illegal conduct. *Id. at 281*, citing *Attorney General v Diamond Mortgage Co, 414 Mich. 603; 327 N.W.2d 805 (1982)*. Concluding that *Kekel* erroneously interpreted § 4(1)(a), the Court of Appeals held, as a matter of law, that defendant was not entitled to summary disposition. *223 Mich. App. at 282-283*.

The Court also concluded that *Kekel* erroneously interpreted § 4(2) of the MCPA, which reads:

Except for the purposes of an action filed by a person under [*MCL 445.911*; MSA 19.418(11)], this act does not **[***9]** apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:

[*454] (a) Chapter 20 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being *sections 500.2001 to 500.2093 of the Michigan Compiled Laws*. [*MCL 445.904(2)(a)*; MSA 19.418(4)(2)(a).]

The Court reasoned that, while § 4(2)(a) generally exempts from the MCPA deceptive acts made unlawful by chapter 20 of the Insurance Code, the first phrase of § 4(2) expressly permits private actions to be brought pursuant to § 11.

[33]** II. Analysis

A motion for summary disposition under *MCR 2.116(C)(10)*, which tests the factual support of a claim, is subject to de novo review. *Spiek v Dep't of Transportation, 456 Mich. 331, 337; 572 N.W.2d 201 (1998)*.

This Court in *Quinto v Cross & Peters Co, 451 Mich. 358, 362-363; 547 N.W.2d 314 (1996)*, set forth the following standards for reviewing motions for summary disposition brought under *MCR 2.116(C)(10)*:

In reviewing a motion for summary disposition brought under *MCR 2.116(C)(10)*, a trial court considers affidavits, pleadings, depositions, [*10] admissions, and documentary evidence filed in the action or submitted by the parties, *MCR 2.116(G)(5)*, in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under *MCR 2.116(C)(10)* if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *MCR 2.116(C)(10)*, (G)(4).**

[*455] In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals, 205 Mich. App. 418, 420, 522 N.W.2d 335 (1994)*. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson, 437 Mich. 109, 115, [*11] 469 N.W.2d 284 (1991)*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n, 202 Mich. App. 233, 237*; *507 N.W.2d 741 (1993)*.** [2]

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[2] We take this occasion to note that a number of recent decisions from this Court and the Court of Appeals have, in reviewing motions for summary disposition brought under *MCR 2.116(C)(10)*, erroneously applied standards derived from *Rizzo v Kretschmer, 389 Mich. 363; 207 N.W.2d 316 (1973)*. These decisions have variously stated that a court must determine whether a record "might be developed" that will leave open an issue upon which reasonable minds may differ, see, e.g., *Farm Bureau Mutual Ins Co of Michigan v Stark, 437 Mich. 175, 184; 468 N.W.2d 498 (1991)*; *First Security Savings Bank v Aitken, 226 Mich. App. 291, 304; 573 N.W.2d 307 (1997)*; *Osman v Summer Green Lawn Care, Inc, 209 Mich. App. 703, 706; 532 N.W.2d 186 (1995)*, and that summary disposition under *MCR 2.116(C)(10)* is appropriate only when the court is satisfied that "it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." *Paul v Lee, 455 Mich. 204, 210; 568 N.W.2d 510 (1997)*; *Horton v Verhelle, 231 Mich. App. 667, 672; 588 N.W.2d 144 (1998)*.

These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not *MCR 2.116(C)(10)*. See *McCart, supra at 115, n 4*. Under *MCR 2.116*, it is no longer sufficient for plaintiffs to *promise to offer* factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under *MCR 2.116(C)(10)* is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. *MCR 2.116(G)(4)*.

Consequently, those prior decisions of this Court and the Court of Appeals that approve of *Rizzo*-based standards for

[*12]** **[*456]** A. Breach of Contract

As stated, the Court of Appeals held that two factual issues precluded the trial court's grant of summary disposition to defendant: (1) whether Smith had authored the slash marks through the "NO" boxes on the application, and (2) whether **[**34]** defendant had relied on the application when issuing the policy. We disagree on both points.

First, the Court of Appeals erred in holding that there was a question of material fact regarding whether Smith "made or caused to be made the marks in the box describing the state of his health . . . ." 223 Mich. App. at 275. Defendant submitted a copy of the completed application bearing Smith's signature immediately below the provision warning that all questions must be answered "honestly and truthfully." Plaintiff does not dispute that the signature on the insurance application is Smith's.

In an attempt to rebut defendant's prima facie showing, plaintiff stated in her affidavit that the slash marks placed through the "YES" and "NO" boxes on the application "are not in my father's handwriting." Plaintiff essentially suggests that Smith may have signed the application in blank and that someone at the dealership filled **[***13]** in the boxes as shown in the application. This Court in General American Life Ins [*457] Co v Wojciechowski, 314 Mich. 275, 283; 22 N.W.2d 371 (1946), rejected a similar attempt to avoid an insurer's claim of misrepresentation voiding an insurance contract:

Appellant claims that there was no showing that [the insured] made the statements found in the application over his signature, that the application might have been signed in blank, and that it might be inferred that the answers had been written in after the application was signed. Defendant offered no proof bearing on this issue and conceded that the signature to the application was that of [the insured.] A copy of the application was attached to the bill of complaint and its authenticity was not denied by the defendant. A prima facie showing was thus made by the [insurer], and the circuit judge correctly concluded that in the absence of any proof to that effect the court would not be justified in finding that a fraud had been perpetrated on either the insurer or the insured, by someone who might have filled in the answers unknown to [the insured.]

As in *Wojciechowski*, plaintiff's argument here **[***14]** constitutes mere speculation, not a reasonable inference from the evidence, and thus does not rise to the level of creating a genuine issue of material fact for trial. Because plaintiff has offered no proof that someone else answered the health inquiries contained in the application without Smith's knowledge or direction, plaintiff has failed to create a genuine issue of material fact regarding the application's authenticity. [3]

Second, we agree with defendant that the Court of Appeals erred in concluding that, under MCL 500.2218; MSA 24.12218, defendant was required to **[*458]** prove that it relied on the misrepresentations contained in Smith's application for insurance. We review de novo questions involving statutory interpretation. Putkamer v Transamerica Ins Corp of America, 454 Mich. 626, 631; 563 N.W.2d 683 (1997). **[***15]**

MCL 500.2218; MSA 24.12218 limits the right of an insurer to rescind an insurance policy on the basis of false statements made in the insurance application. The statute provides in relevant part:

The falsity of any statement in the application for any disability insurance policy covered by chapter 34 of this code may not bar the right to recovery thereunder unless such false statement *materially affected either the acceptance of the risk or the hazard assumed by the insurer*. [MCL 500.2218; MSA 24.12218 (emphasis added).]

This Court has not had occasion to address directly whether § 2218 requires an insurer to show that it actually relied upon a false statement made in an insurance **[**35]** application before the insurer may avoid payment under the policy. [4] The Court of Appeals imposed such a requirement in Howard v Golden State Mutual Life Ins Co, 60 Mich. App. 469, 477; 231 N.W.2d 655 (1975). See also United of Omaha Life Ins Co v Rex Roto Corp, 126 F.3d 785, 787 (CA 6, 1997); Auto-Owners Ins Co v Comm'r of Ins, 141 Mich. App. 776,

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reviewing motions for summary disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so.

[3] Because plaintiff failed to rebut defendant's prima facie showing, the Court of Appeals erred in holding that defendant was required to submit additional evidence.

[4] Some of our past decisions arguably have implied such a requirement. See, e.g., Manufacturers Life Ins Co v Beardsley, 365 Mich. 308, 311; 112 N.W.2d 514 (1961); Prudential Ins Co of America v Ashe, 266 Mich. 667, 671-672; 254 N.W. 243 (1934); Nat'l Life & Accident Ins Co v Nagel, 260 Mich. 635, 638; 245 N.W. 540 (1932).

781, n 3; 369 N.W.2d 896 (1985). **[***16]** However, it is **[*459]** clear that the *Howard* Court never considered the precise language used in the statute. [5]

As an initial matter, we find **[***17]** it significant that § 2218 does not expressly mention reliance. Moreover, while the insurer, under § 2218, necessarily must have relied on a false statement in an insurance application in order for such a statement to have materially affected the insurer's "acceptance of the risk," the statute also permits the insurer to rescind the policy if the false statement materially affected the "hazard assumed" by the insurer. In Wickersham v John Hancock Mut Life Ins Co, 413 Mich. 57, 63; 318 N.W.2d 456 (1982), we recognized that the Legislature's use of "either" and "or" indicates that the terms "acceptance of the risk" and "hazard assumed" have different meanings. We must give effect to both terms in order to avoid rendering either term mere surplusage. Smith v Employment Security Comm, 410 Mich. 231, 250; 301 N.W.2d 285 (1981).

As we explained in Wickersham, 413 Mich. at 63:

Acceptance of the risk refers to the time of making of the contract of insurance and to the insurance concept of risk. Whether an insurer determines to enter into a contract is affected by its assessment of the likelihood of a fact increasing the chances **[***18]** of the loss insured against.

[*460] On the other hand, the term "hazard assumed" refers to the circumstances of the loss. 413 Mich. at 62. In order for a misstatement to be material to the hazard assumed, the misstatement "'must be shown in some way to have affected [the hazard] or contributed to the loss . . . .'" 413 Mich. at 62, quoting Prudential Ins Co of America v Saxe, 77 U.S. App. D.C. 144, 156; 134 F.2d 16 (1943). Thus, in Wickersham, supra at 63, we observed that the insured's undisclosed heart problems did not affect or contribute to the hazard assumed because the insured died in a swimming accident. [6]

[36]** **[***19]** Accordingly, while a misrepresentation in an insurance application clearly cannot affect an insurer's **[*461]** "acceptance of the risk" unless the insurer relied on the misrepresentation in issuing the policy, we conclude that such a misrepresentation materially affects the "hazard assumed" by an insurer whenever the facts misrepresented are causally connected to the loss. When such a causal relationship exists, an insurer is entitled to rescind the policy under § 2218 even without a showing of reliance. [7]

[*20]** In this case, Smith misrepresented his health, stating that he did not have a heart condition. In fact, Smith died of a heart attack. Under these circumstances, it is beyond question that Smith's

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[5] Justice Kelly's dissent, 460 Mich. 446, 597 N.W.2d 28, 1999 Mich. LEXIS 1894, *36, finds the *Howard* decision to be persuasive in interpreting the statute because the *Howard* Court adopted a reliance requirement "immediately after quoting § 2218." However, we believe it clear that the "test" that was "formulated" by the Court of Appeals in *Howard* was not based upon the language of the statute, but drawn from a law review article "and cases therein footnoted." Howard, supra at 477.

[6] Justice Kelly's dissent, 460 Mich. 446, 597 N.W.2d 28, 1999 Mich. LEXIS 1894, *32, claims that we have avoided what clearly is *Wickersham*'s discussion of the meaning of § 2218's *materiality* requirement. See MCL 500.2218(1); MSA 24.12218(1) ("No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract"). That argument highlights the dissent's fundamental misunderstanding of § 2218. On its face, the statute's materiality provision plainly requires that the insurer demonstrate, in hindsight, that it "would have" refused to issue the policy if it had known the facts misrepresented. Such a post hoc determination simply has nothing to do with whether the insurer *in fact* relied on the misrepresentation when issuing the policy. Thus, the *Wickersham* Court's "analysis" to which the dissent refers is wholly inapposite.

The dissent, 460 Mich. 446, 597 N.W.2d 28, 1999 Mich. LEXIS 1894, *34, further argues that § 2218(2) "expressly requires an insurer to establish that the prospective insured misrepresented a fact that *induced* the insurer to contract . . . ." Thus, claims the dissent, "an express reference to reliance would be surplusage." 1999 Mich. LEXIS 1894, *35. The statute clearly does *not* state that the misrepresentation must have induced the insurer to contract. Rather, it simply defines a representation as one that is made "as an inducement to the making" of a contract.

While that distinction obviously eludes the dissent, we believe it to be an important one. Clearly, an applicant may make a misrepresentation "as an inducement to the making" of a contract without the inducement actually causing the insurer to contract. Our construction, contrary to the dissent's, gives meaning to the Legislature's use of "either" and "or," which use, as stated, indicates that the terms "acceptance of the risk" and "hazard assumed" have different meanings.

[7] Justice Kelly's dissent, 1999 Mich. LEXIS 1894, *36, claims that we have cited *Wickersham* "for the proposition that a misrepresentation affecting the hazard assumed by the

misrepresentation is causally connected to the loss. The misrepresentation materially affected the hazard assumed, Smith's death, regardless of whether **[*462]** defendant actually relied on that misrepresentation. Therefore, under § 2218, defendant was not required to establish reliance in order to avoid payment under the policy.

Accordingly, we reverse the Court of Appeals decision on the breach of contract claim and reinstate the trial court's order granting summary disposition to defendant.

B. Michigan Consumer Protection Act

Turning to the issue whether defendant is exempted from plaintiff's claim of MCPA violations, we first examine whether defendant is exempted by § 4(1)(a). The language of § 4(1)(a) provides that the MCPA is inapplicable to a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state . . . ." MCL 445.904(1); MSA 19.418(4)(1). Defendant asserts **[***21]** that its application and certificate of insurance forms were submitted to [8] and **[**37]** implicitly approved by [9] **[***22]** the State Commissioner **[*463]** of Insurance. Hence, it contends, the immediate transaction, the sale of credit life insurance, was "specifically authorized" and, therefore, was exempted under § 4(a)(1). [10] Plaintiff, however, essentially responds that the statute does not specifically authorize the *fraudulent* insurance practices that she claims were committed in this case.

As the Court of Appeals recognized, our decision in *Diamond Mortgage* [11] controls the resolution of this issue. In *Diamond Mortgage,* the defendant, a real estate broker, also advertised and offered loans to homeowners at an eleven-percent interest rate. The financing arrangement resulted in the defendant receiving a "brokerage or prepaid finance fee" that the Attorney General alleged was actually an interest charge and, moreover, usurious. 414 Mich. at 607. The Attorney General also claimed that the defendant used confusing and inconsistent forms and that its method of doing business violated the MCPA. *Id.*

[*23]** The defendant in *Diamond Mortgage* argued that it was exempt from the MCPA under § 4(1)(a) because it had a real estate broker's license and that one of the activities contemplated was that a licensee would negotiate the mortgage of real estate. 414 Mich.

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insurer, as distinguished from the risk accepted, does not require reliance." The dissent further accuses us of "omitting portions of *Wickersham*, and misconstruing the remainder . . . ." 1999 Mich. LEXIS 1894, *39.

We do not suggest that *Wickersham* in any way addressed the reliance issue presented here. We simply find instructive to our interpretation of § 2218 the fact that the *Wickersham* Court, albeit in another context, recognized and gave effect to the conceptual difference between "acceptance of the risk" and "hazard assumed." Interestingly, the dissent does not offer its own construction of these key statutory phrases. We similarly reject the dissent's determined effort, 1999 Mich. LEXIS 1894, *32, to make dicta in *Wickersham* a holding by observing that the *Wickersham* Court's passing mention of reliance was a "pointed reference." Whether the *Wickersham* Court's reference to reliance was "pointed" or otherwise, it is clear that the reference is dicta. Clearly, reliance was not the issue *Wickersham* decided, and its fleeting mention of reliance did not constitute a considered analysis of the statutory terms at issue here.

Justice Kelly's dissent, 1999 Mich. LEXIS 1894, *38, n 7, also accuses us of ignoring the meaning of the word "affect" "by failing to explain how a misrepresentation, which may never have been received by the insurer, affected the hazard assumed." As explained in the text, because the phrase "hazard assumed" refers to the *circumstances of the loss* rather than the *time of making of the contract*, a misrepresentation that is causally connected to the loss "affects" the "hazard assumed" regardless of whether the insurer actually relied on the misrepresentation in issuing the policy.

[8] MCL 550.612; MSA 24.568(12) provides:

All policies, certificates of insurance, notices of proposed insurance, applications for insurance, binder, endorsements and riders shall be filed with the commissioner of the state in which the policy is issued.

[9] MCL 550.613; MSA 24.568(13) provides:

The commissioner within 30 days after the filing of all policies, certificates of insurance, notices of proposed insurance, applications for insurance, binders, endorsements and riders, in addition to other requirements of law, may disapprove any such form if the benefits provided therein are not reasonable in relation to the premium charge or if it contains provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such policy.

[10] See also the Credit Insurance Act, MCL 550.601 et seq.; MSA 24.568(1) *et seq.* Section 2 of the act provides, in relevant part: "All life insurance and all accident and health insurance sold in connection with loans or other credit transactions shall be subject to the provisions of this act . . . ."

[11] 414 Mich. at 617.

at 616. Like plaintiff here, the defendants in *Diamond Mortgage* responded that "no statute [or regulatory agency] specifically authorized misrepresentations or false promises" made in conducting that activity. 414 Mich. at 617.

[*464] In concluding that the defendants were not exempt from the MCPA, this Court reasoned:

While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of § 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency **specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically [***24] authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.** [414 Mich. at 617.]

In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is "specifically authorized." Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not "specifically authorized" under the defendant's real estate broker's license.

Applying this analysis in *Kekel,* the Court of Appeals concluded that the defendant insurer in that case was exempted from the plaintiff's alleged violations of the **[**38]** MCPA pursuant to MCL 445.903; MSA 19.418(3). It explained:

Diamond is distinguishable from the case at bar. The activities of the defendant in *Diamond* which the plaintiffs there were complaining of were not subject to any regulation under the real estate broker's license of the defendant and thus such **[***25]** conduct was not reviewable by the applicable **[*465]** licensing or regulatory authority. . . . The insurance industry is under the authority of the State Commissioner of Insurance and subject to the extensive statutory and regulatory scheme, all administered "by a regulatory board or officer acting under statutory authority of this state." [144 Mich. App. at 384, citing MCL 445.904(1)(a); MSA 19.418(4)(1)(a).]

Consistent with these rulings, we conclude here that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that § 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically **[***26]** authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." [12] As a consequence, we **[*466]** reverse the judgment of the Court of Appeals, in part, on this issue.

[*27]** However, we agree with the Court of Appeals that the *Kekel* Court misconstrued § 4(2) of the MCPA. In addition to the broad exemption provided in § 4(1)(a),

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[12] Citing *Temborius v Slatkin,* 157 Mich. App. 587; 403 N.W.2d 821 (1986), Justice Cavanagh's concurrence, 1999 Mich. LEXIS 1894, *48, argues that, "under the majority's interpretation of 'transaction or conduct,' the defendant's conduct [in *Temborius*] would be exempt [from the MCPA] under subsection 4(1)(a) because the sale of automobiles is specifically authorized by the Secretary of State . . . ." The concurrence, 1999 Mich. LEXIS 1894, *48, further invites us to "provide meaningful examples where a consumer would not be blocked by subsection 4(1)(a) . . . ."

We need not reach or otherwise address consumer transactions that are not before us because it is clear *in this case* that the sale of credit life insurance *is* "specifically authorized" under the Credit Insurance Act, which is administered by the insurance commissioner. See MCL 550.601 *et seq.*; MSA 24.568(1) *et seq.*; see also MCL 500.402; MSA 24.1402 ("No person shall act as an insurer and no insurer shall issue any policy or otherwise transact insurance in this state except as authorized by a subsisting certificate of authority granted to it by the commissioner pursuant to this code"); MCL 500.200; MSA 24.1200 ("There is hereby established a separate and distinct state department which shall be especially charged with the execution of the laws in relation to insurance"). Thus, it is clear that, contrary to the position of the concurrence, 1999 Mich. LEXIS 1894, *49, insurance companies are not "like most businesses."

§ 4(2) provides in relevant part:

Except for the purposes of an action filed by a person under [MCL 445.911; MSA 19.418(11)], this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:

(a) Chapter 20 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws. [MCL 445.904; MSA 19.418(4).]

Thus, § 4(2)(a) specifically exempts from the MCPA unfair, unconscionable, or deceptive methods, acts, or practices made unlawful by chapter 20 of the Insurance Code. [13] Yet, the first phrase of § 4(2) explicitly provides that the exemption is **[**39]** inapplicable to actions filed under § 11 of the MCPA, which provides in relevant part:

(1) Whether or not he seeks damages or has an adequate remedy at law, a person may bring an action to do either or both of the following:

(a) Obtain a declaratory judgment that a method, act, or practice **[***28]** is unlawful under section 3.

[*467] (b) Enjoin in accordance with the principles of equity a person who is engaging or is about to engage in a method, act, or practice which is unlawful under section 3.

(2) Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $ 250.00, whichever is greater, together with reasonable attorneys' fees. [MCL 445.911; MSA 19.418(11).]

Giving effect to both § 4(1) and § 4(2), we conclude that private actions are permitted against an insurer pursuant to § 11 of the MCPA regardless of whether the insurer's activities are "specifically authorized." Although § 4(1)(a) generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, § 4(2) provides an exception to that exemption by permitting private actions pursuant to § 11 arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by §§ 4(1)(a) and 4(2)(a) are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 **[***29]** of the Insurance Code.

For these reasons, we conclude that defendant is not entitled to summary disposition with regard to plaintiff's MCPA claims. To the extent that *Kekel* and its progeny [14] are inconsistent with this holding, they are overruled.

III. Conclusion

We reverse the Court of Appeals decision on the breach of contract claim. There is no genuine issue of **[*468]** material fact regarding the authenticity of the insurance application. Moreover, under the circumstances of this case, defendant was not required to establish that it relied on Smith's misrepresentation when issuing the policy. Therefore, the trial court's grant of **[***30]** summary disposition for defendant on the breach of contract claim is reinstated.

We affirm the Court of Appeals in part and reverse in part with regard to the alleged violations of the MCPA. Contrary to the Court of Appeals conclusion, § 4(1)(a) exempts the sale of insurance from the provisions of the MCPA. However, we agree with the Court of Appeals that § 4(2) provides an exception to that exemption by permitting private actions pursuant to § 11. Therefore, defendant is not entitled to summary disposition of plaintiff's MCPA claims. This case is remanded to the trial court for further proceedings.

WEAVER, C.J., and BRICKLEY, TAYLOR, and CORRIGAN, JJ., concurred with YOUNG, J.

Concur by: Marilyn Kelly (In Part); Michael F. Cavanagh (In Part)

Dissent by: Marilyn Kelly (In Part); Michael F. Cavanagh (In Part)

Dissent

KELLY, J. (*concurring in part and dissenting in part*).

[13] See, generally, MCL 500.2001 et seq.; MSA 24.12001 *et seq.*

[14] See Bell v League Life Ins Co, 149 Mich. App. 481; 387 N.W.2d 154 (1986).

In addition to joining Justice Cavanagh's dissenting opinion regarding plaintiff's Michigan Consumer Protection Act claim, I respectfully dissent from the majority's resolution of plaintiff's breach of contract claim. I disagree that defendant is entitled to summary disposition [1] because Robert **[**40]** Smith made a **[*469]** material **[***31]** misrepresentation in an insurance application, absent any showing that defendant relied on the misrepresentation.

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[1] I also dissent from the majority's attempt to create a new standard for reviewing motions for summary disposition under the guise of McCart v J Walter Thompson USA, Inc, 437 Mich. 109, 115, n 4; 469 N.W.2d 284 (1991). In *McCart*, this Court explained:

[A] mere promise to offer factual support at trial was categorized as a "pleading" under the pre-1985 court rules, see e.g., Rizzo v Kretschmer, 389 Mich. 363, 377; 207 N.W.2d 316 (1973), and, as such, is precisely what is now insufficient under the new requirements of MCR 2.116(G)(4), enacted in 1985.

The observation addressed nothing more than the production of documentary evidence sufficient to survive a motion for summary disposition. But the majority here, without providing supporting authority, intimates that the observation rejected the longstanding rule regarding the standard for reviewing motions for summary disposition under MCR 2.116(C)(10). Michigan appellate courts have interpreted the rule in a consistent fashion for the past thirteen years. The interpretation is that an award of summary disposition is inappropriate unless it is impossible for the nonmoving party to support its claim at trial because of a deficiency that cannot be overcome. Lytle v Malady (On Rehearing), 458 Mich. 153, 176; 579 N.W.2d 906 (1998)(Weaver, J.); Paul v Lee, 455 Mich. 204, 210; 568 N.W.2d 510 (1997); Horton v Verhelle, 231 Mich. App. 667, 672; 588 N.W.2d 144 (1998); Berry v J & D Auto Dismantlers, Inc, 195 Mich. App. 476, 479; 491 N.W.2d 585 (1992); Dzierwa v Michigan Oil Co, 152 Mich. App. 281, 284; 393 N.W.2d 610 (1986). In fact, in *McCart* itself, we reiterated the continuing vitality of the previous standard of review by citing with approval the decision in Ewers v Stroh Brewery Co, 178 Mich. App. 371; 443 N.W.2d 504 (1989). In that case, the Court of Appeals provided, "before judgment may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial." Id. at 374. Therefore, although courts are now required to review documentary evidence as provided in *McCart*, MCR 2.116(C)(10), when adopted, did not alter the way this evidence is to be examined. The majority provides no rationale for rejecting our consistent interpretation of a longstanding court rule. Therefore, I dissent from what, regrettably, amounts to an attempt to lower the bar for granting summary disposition.

[*32]** When a material misrepresentation of fact affects acceptance of the risk or hazard assumed by an insurer, MCL 500.2218; MSA 24.12218 permits the insurer to void the policy. Wiedmayer v Midland Mut Life Ins Co, 414 Mich. 369, 374; 324 N.W.2d 752 (1982). The statute provides, in pertinent part:

The falsity of any statement in the application for any disability insurance policy covered by chapter 34 of this code may not bar the right to recovery thereunder unless such **[*470]** false statement materially *affected either* the acceptance of the risk or the hazard assumed by the insurer.

(1) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract.

(2) A representation is a statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, *at or before the making of the insurance contract as an inducement to the making thereof.* **[***33]** A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false. [MCL 500.2218; MSA 24.12218 (emphasis added).]

Although the majority finds it "significant that § 2218 does not expressly mention reliance," and purports to rely on *In re Certified Question, Wickersham v John Hancock Mut Life Ins Co* [2] as authority for its holding, it

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[2] 413 Mich. 57; 318 N.W.2d 456 (1982).

[3] In *Wickersham*, this Court expressly noted that "the Legislature has limited in other ways an insurer's power to avoid an insurance policy on grounds of material misrepresentation." Id., 66. Citing MCL 500.4014; MSA 24.14014, this Court explained that an insurance policy "generally 'shall be incontestable after it shall have been in force during the lifetime of the insured for 2 years.'" *Id.* This limitation strengthens the logical conclusion that reliance is required to avoid a contract because it emphasizes that the "two-year limit permits full investigation by an insurance company of any matters *which formed part of the decision to make the contract.*" Id., 66-67 (emphasis added).

[4] The majority demonstrates the weakness of its statutory analysis by creating a distinction where none exists, stating:

avoids the following analysis in *Wickersham*:

A review of *all* the subsections under this statute fails to support the claim of plaintiff that a causal relation between the false statement and loss is required. In 1957, the Legislature amended MCL 500.2218; MSA 24.12218 by adding the four numbered paragraphs to this section. 1957 PA 91. The added paragraphs, in part, define misrepresentation and materiality. *These additional* **[**41]** *provisions further indicate a legislative intent to determine materiality at the time the insured signs the application and the insurer decides whether to issue a policy to the applicant.*

* * *

[*471] That materiality is to be tested *well before* the loss occurs is also demonstrated by **[***34]** subsection (2). This statutory language defines representation and misrepresentation as a statement "at or before the making of the insurance contract as an inducement to the making thereof." [*Id. at 65* (emphasis added).] [3]

Because § 2218(2) expressly requires an insurer **[***35]** to establish that the prospective insured misrepresented a fact that *induced* [4] the insurer to contract, an express reference to reliance would be surplusage.

[*36]** **[*472]** Interpreting § 2218, the Court of Appeals has formulated a test. It succinctly provides that, to void a policy on the basis of a misrepresentation under the statute, an insurance company must

(1) demonstrate that [a] misrepresentation was in fact made; (2) show that the insurer relied upon the statement; and, (3) prove that the misrepresentation was material to the risk and hazard accepted by the insurer. [*Howard v Golden State Mutual Life Ins Co, 60 Mich. App. 469, 477; 231 N.W.2d 655 (1975)*; see *United of Omaha Life Ins Co v Rex Roto Corp, 126 F.3d 785 (CA 6, 1997)*.]

The majority observes that the *Howard* decision did not consider the precise language used in § 2218. However, it neglects to mention that the *Howard* panel formulated this test immediately after quoting § 2218. *60 Mich. App. at 476-477*.

As noted above, the majority cites *Wickersham, 413 Mich. at 63* for the proposition that a misrepresentation affecting the hazard assumed by the insurer, as distinguished from the risk accepted, does not require reliance. [5] However, in *Wickersham,* this Court merely addressed the narrow question

whether [§ **[***37]** 2218] requires that there be a causal relation between a material misrepresentation **[**42]** and the loss insured against before a right to recover under an insurance policy is barred. [*413 Mich. at 62*.]

In *Wickersham*, the plaintiff filed a claim against an insurer for recovery of life insurance proceeds after her husband died in a swimming accident. *413 Mich. at 60*. The **[*473]** plaintiff conceded that her husband had misrepresented his medical record before he applied for the policy. She argued that the misrepresentation was not material, because it involved an undisclosed health problem that was unrelated to his death. However, the defendant insurer countered that the misrepresentation

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The statute clearly does not state that the misrepresentation must have induced the insurer to contract. Rather, it simply defines a representation as one that is made "as an inducement to the making" of a contract. While that distinction obviously eludes the dissent, we believe it to be an important one. Clearly, an applicant may make a misrepresentation "as an inducement to the making" of a contract without the inducement actually causing the insurer to contract. Our construction, contrary to the dissent's, gives meaning to the Legislature's use of "either" and "or," which use, as stated, indicates that the terms "acceptance of the risk" and "hazard assumed" have different meanings. [Slip op at 13, n 6 (emphasis added).]

According to Black's Law Dictionary, inducement is "to *cause* [a] party to choose one course of conduct rather than another." Black's Law Dictionary (6th ed), p 775 (emphasis added). To circumvent the meaning of § 2218(2), the majority creates its own distinction by eliminating the causation element of inducement. No authority exists to support this surprising distinction.

[3] The plaintiff in *Attorney General v Diamond Mortgage, 414 Mich. 603, 616; 327 N.W.2d 805 (1982)*, argued that deceptive practices are not specifically authorized.

[4] The defendant in *Diamond* asserted that because he was a licensed real estate broker, he was specifically authorized to negotiate the mortgage of real estate and perform all the acts of a broker. *414 Mich. at 616*. The majority in the instant case similarly attaches a very general label, the sale of insurance, to the transaction at issue.

[5] The majority concedes that an insurer "necessarily must have relied on a false statement in an insurance application in order for such a statement to have materially affected the insurer's 'acceptance of the risk . . . .'" Slip op at 13.

deceived it into accepting the insurance application, which otherwise it would have rejected.

This Court explained that, for a misstatement to be material to the hazard assumed, it must have affected the hazard assumed or contributed to the loss. [6] 413 Mich. at 62. On the basis of the narrow question presented for review, this Court held that the misrepresentation did not *affect* or contribute to the hazard assumed. [7] Id., 62-63. Consequently, it was ruled **[***38]** not material to the hazard assumed. *Id.*

We held that, as regards a material misrepresentation, § 2218 does not require establishing a causal relationship between the misrepresentation and the circumstances of the loss before recovery is **[***39]** barred. 413 Mich. at 65. We also explained:

It is important to note that the instant case involves a narrow question based upon a limited record. We are not presented with a record involving questions of good-faith answers, errors in writing the application, concealment of trivial or clearly nonmaterial ailments, ***reliance***, or other questions of fact. [413 Mich. at 70-71 (emphasis added).]

[*474] By omitting portions of *Wickersham*, and misconstruing the remainder, the majority reached an erroneous conclusion: that *Wickersham* supports the proposition that defendant was not required to establish reliance in order to avoid payment under the policy. Although *Wickersham* failed to expressly address the issue of reliance, the majority fails to provide any explanation for *Wickersham*'s pointed reference to it. 413 Mich. at 71.

An insurer has the burden of establishing a claim of misrepresentation. Szlapa v Nat'l Travelers Life Co, 62 Mich. App. 320, 325; 233 N.W.2d 270 (1975). Defendant moved for summary disposition. Therefore, it had the burden of establishing the absence of a genuine issue of material fact on **[***40]** the three elements required to void the insurance policy for misrepresentation. It was obligated, as well, to support its position by affidavits, depositions, admissions, or other documentary evidence. Quinto v Cross & Peters Co, 451 Mich. 358, 362, 547 N.W.2d 314 (1996).

Defendant submitted an affidavit by a former underwriter to support its claim that the misrepresentation was material to its acceptance of the risk or hazard assumed. The affidavit stated that defendant would have refused to insure Smith had it been aware of his medical condition at the time it issued the policy.

Unlike the defendant insurer in *Wickersham*, defendant Globe failed to allege that it was deceived by Smith's misrepresentation. The affidavit asserted that knowledge of the misrepresentation would have adversely affected its decision to insure Smith. However, it failed to declare that defendant received the **[*475]** application **[**43]** before insuring plaintiff or that it relied on it. [8]

[*41]** Therefore, defendant omitted to allege reliance on the misrepresentation by affidavit or other documentary evidence. It failed to meet its burden of establishing this element of the *Howard* test, and failed to establish a misrepresentation under the definition provided by the Legislature in MCL 500.2218(2); MSA 24.12218(2). Therefore, it was not entitled to summary disposition on the breach of contract claim.

I believe that the majority erred in concluding that the defendant insurer was entitled to summary disposition with regard to plaintiff's breach of contract claim. By awarding defendant insurer summary disposition absent any allegation of reliance, the majority encourages insurers to search their records in an effort to find any inconsequential mistake to deny coverage. I would affirm the Court of Appeals judgment on this issue and remand for further proceedings.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I join Justice Kelly's dissenting opinion regarding the breach of contract issue. [1] While I concur in the result reached by the majority regarding the MCPA claim, I am

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[6] Unlike the defendant in *Wickersham*, the insurer here failed even to allege that it was deceived by Smith's misrepresentation.

[7] Section 2218 requires an insurer to establish that knowledge of the misrepresented facts would have led it to refuse to contract. Although the majority attributes great weight to the Legislature's use of the word "either," it ignores the meaning of the word "affect" by failing to explain how a misrepresentation, which may never have been received by the insurer, affected the hazard assumed.

[8] Similarly, during oral argument, defense counsel declined to represent that defendant received Smith's application or relied on the misrepresentation in it.

[1] However, I do not join in footnote 1 of her opinion.

in disagreement with the majority's analysis of subsections **[***42]** 4(1)(a) and 4(2). Confusion in analyzing MCPA claims has resulted from: construing the exemptions too broadly, rendering the vast majority **[*476]** of private suits exempt under subsection 4(1)(a), [2] **[***43]** construing the exemptions too narrowly so as to remove all exemptions, [3] or construing the transaction or conduct at issue overly broad [4] or narrow, [5] rendering the MCPA or its exemptions meaningless. It is my opinion that a proper inquiry should be first to determine whether the specific transaction or conduct at issue, as opposed to the general transaction, is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state . . . ." MCL 445.904(1)(a); MSA 19.418(4)(1)(a). The next inquiry should characterize the party filing suit and the act or practice at issue to determine whether the act should apply to the method, act, or practice.

MCPA subsection (4)(1)(a)

[*44]** Subsection 4(1) provides:

[*477] This act does not apply to either of the following:

(a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

(b) An act done by a publisher, owner, agent . . . .

[44]** It appears that the Legislature intended to provide defendants with a very narrow exemption for transactions or conduct *specifically authorized*, and for specific acts done by the media. Under this statute, we must examine the specific transaction or conduct at issue to determine whether the narrow exemption provided in subsection 4(1)(a) is applicable.

The majority correctly notes that *Attorney General v Diamond Mtg Co, 414 Mich. 603; 327 N.W.2d 805 (1982)*, controls the resolution of this case, and that this Court cautioned that the exemption provided in subsection 4(1)(a) will continue to apply where a party seeks to attach labels to a transaction or conduct that is specifically authorized. *414 Mich. at 617*. The majority then characterizes the transaction or conduct at issue as "the sale of credit life insurance," which it asserts **[***45]** is exempt from subsection 4(1)(a) because it is specifically authorized. Slip op at 20. The majority then revokes this exemption by reading an exception in subsection 4(2) to the exemption in subsection 4(1)(a). In effect, this allows the court to ignore the exemption provided in subsection 4(1)(a) every time a private action is filed against an insurer under § 11. [6] Because § 11 is the only section in which a private party may file suit, under the majority view, **[*478]** we should never examine the exemptions section when a private action has been filed against an entity encompassed by subsections 4(2)(a)-(e). As stated in *Diamond*, I disagree that subsection 4(1)(a) is meaningless. *Id.* The Legislature provided an exception to the exemption within subsection 4(2) for private actions by placing qualifying language in front of the exemption for acts already made unlawful by specified public acts. If it had intended such a result, it seems that the Legislature would have placed a similar limiting clause in subsection 4(1)(a) providing:

Except for the purposes of an action filed by a person under section 11, this act shall not apply to a transaction or conduct specifically authorized **[***46]** . . . .

It did not. Alternatively, the Legislature could have placed such language preceding both exemptions 1 and 2, thus mandating that the exception for private suits applies to all subsections of § 4.

Without analysis, the majority reads subsection 2 as an exception to subsection 1. I cannot agree. Thus, I would not remove the exemption for conduct "specifically authorized" in these cases.

In this case, plaintiff complains that defendant utilized both a certificate of insurance and an application for insurance, and that these documents provided inconsistent eligibility requirements. Thus, plaintiff does not complain that defendant "sold insurance," as characterized by defendant and the majority.

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[2] See *Kekel v Allstate Ins Co, 144 Mich. App. 379, 383; 375 N.W.2d 455 (1985)*, determining whether the transaction or conduct is the subject of regulatory control.

[5] The plaintiff in *Diamond* characterized the conduct as deceptive practices. *414 Mich. at 616*. The majority in the instant case states that plaintiff argued that the statute does not specifically authorize the fraudulent insurance practices that she claims were committed. Slip op at 17. I could find no support for the statement that plaintiff characterized the transaction as "fraudulent insurance practices." This, however, would be an example of too narrow a characterization of the transaction or conduct.

[6] *MCL 445.911*; MSA 19.418(11) allows a person to recover actual damages and attorney fees for a violation of the MCPA.

Alternatively, as noted in *Diamond,* this conduct should not be characterized as "misrepresentations or false promises," as this would never be "specifically authorized." **[***47]** *Id. at 617*. Instead, we must ask whether defendant was specifically authorized to use separate **[*479]** insurance eligibility forms, for a single transaction, that contain inconsistent or differing conditions for coverage eligibility. Defendant argued that an insurer is not required to attach an insurance application to the certificate of insurance. However, it has not asserted that it is specifically authorized to utilize separate forms with inconsistent eligibility requirements. Defendant does not provide an explanation regarding the inconsistent requirements. Defendant informs us that credit insurers are required to submit all policies, certificates, applications, notices, etc., under *MCL 550.612*; MSA 24.568(12), and that the insurance commissioner implicitly approves them by failing to object within thirty days under *MCL 550.613*; MSA 24.568(13). However, defendant **[**45]** has not argued that it has submitted the forms at issue. Even assuming that these forms were submitted and implicitly approved, there is no indication that the commissioner was aware that the forms were being used together for a single insurance sale transaction. **[***48]** Furthermore, I question whether the insurance commissioner's silence may be construed as a "specific authorization" under subsection 4(1)(a). Defendant would have us hold that conduct generally or implicitly allowed is exempt. Such a broad interpretation of such narrow language would result in all MCPA claims being barred. Businesses are generally allowed to transact business. The MCPA protects consumers from the unfair transaction of business.

To illustrate, in *Temborius v Slatkin, 157 Mich. App. 587; 403 N.W.2d 821 (1986)*, the plaintiff filed suit against a car dealership and salesman under the MCPA. She alleged that the dealer represented that an automobile would be delivered to her upon payment to a **[*480]** third party, when the dealer knew that the third party would be unable to complete the transaction because of the third party's financial difficulties. *Id. at 593*. The Court held that if plaintiff's evidence was believed, the jury could find violations of the MCPA. 157 Mich. App. at 598. This is a good example of the unfair trade practice that is barred by the MCPA. However, under the majority's interpretation of "transaction or conduct," the defendant's conduct **[***49]** would be exempt under subsection 4(1)(a) because the sale of automobiles is specifically authorized by the Secretary of State, *MCL 257.248*; MSA 9.1948. Slip op at 20.

Under the majority view, any activity that is *regulated* by a regulatory board or officer acting under statutory authority of this state or the United States, is specifically authorized. The majority effectively adopts the *Kekel* interpretation of the statute. The *Kekel* Court provided:

We first look to the exemption language of § 4(1)(a) to determine if plaintiffs' complaint speaks to a transaction or conduct which would be the subject of regulatory control "under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." [*Kekel v Allstate Ins Co, 144 Mich. App. 379, 383; 375 N.W.2d 455 (1985)* (citation omitted).]

The majority does not direct us to a law administered by the insurance commissioner that provides that "sale of insurance is authorized." Like most businesses, it is merely regulated. Under this broad labeling, all MCPA claims will be blocked by subsection 4(1)(a) unless they fall **[***50]** within the exceptions listed in subsections 4(2)(a)-(e). I suggest the majority cannot provide meaningful examples where a consumer **[*481]** would not be blocked by subsection 4(1)(a) under its reading of the terms "specifically authorized."

Under *MCL 445.903*; MSA 19.418(3), the MCPA protects consumers from unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of "trade or commerce." Trade or commerce is defined, in part, as:

The conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. [*MCL 445.902(d)*; MSA 19.418(2)(d).]

In simple terms, the MCPA protects consumers from unfair business practices regarding the sale of personal, family, or household goods or services. Because such businesses are regulated, the consumer has little or no redress under the provisions of the MCPA according to the majority.

Instead, I read the statute **[***51]** consistent with our determination in *Diamond* that general transactions or conduct subject to **[**46]** licensing are not necessarily exempt from the MCPA. Plaintiff correctly notes that "subject to regulation" is not the same as "specifically

authorized." [7] In the instant case the transaction or conduct at issue is defendant's use of inconsistent insurance eligibility forms. Defendant has failed to show that this conduct is specifically authorized. At **[*482]** most, defendant has shown that when used separately, the forms are implicitly allowed. This is insufficient.

MCPA subsection 4(2)

This section provides:

Except for the purposes of an action filed by a person under section 11, this act shall not apply to an unfair, unconscionable, or deceptive method, **[***52]** act, or practice that is made unlawful by [various specified public acts.]

In this case, plaintiff, daughter of the deceased insured, is "a person" as defined by MCL 445.902(c); MSA 19.418(2)(c), which includes a natural person.

Furthermore, plaintiff filed under subsection 11(2) which provides:

Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $ 250.00, whichever is greater, together with reasonable attorneys' fees.

The court in Robertson v State Farm Fire & Casualty Co, 890 F. Supp. 671, 674-675 (ED Mich, 1995), correctly explained the organization of the different sections of the MCPA:

Thus, section 11 is the section regarding private causes of action brought by consumers. The only other sections addressing who may bring actions under the act (and under what circumstances) are sections 10 and 15. Section 10 applies to class actions brought by the attorney general on behalf of citizens of the state, and § 15 extends to county prosecutors the power of the attorney general to bring suit. [Citations omitted.]

[*483] Section 11 allows private **[***53]** actions to be brought and § 4(2) excepts actions brought under § 11 from exemption from the Michigan Consumer Protection Act. Therefore, plaintiffs' action is not exempted from the act's purview. The act allows private party suits where state-initiated prosecution would be precluded under [MCL 445.904(2)(a)-(g); MSA 19.418(4)(2)(a)-(g).]

Plaintiff's complaint alleged violations of the MCPA. Specifically, she alleged violations of MCL 445.903(a)-(e); MSA 19.418(3)(a)-(e), and requested actual damages and attorney fees pursuant to § 11. Therefore, plaintiff's suit is not barred by the exemption provided in subsection 4(2).

I disagree with the conclusion that we should ignore subsection 4(1)(a) when a private suit is filed against an insurer, yet utilize it to bar most consumer claims that do not fall under the exception listed in subsections 4(2)(a)-(e). However, I agree that defendant was not entitled to summary disposition on its MCPA claim. I would hold that because defendant has failed to provide evidence that its conduct, using inconsistent insurance eligibility forms in a single transaction, is specifically authorized, **[***54]** it is not exempt from suit under subsection 4(1)(a) of the MCPA. I would also hold that because plaintiff is a person filing under § 11, defendant is not exempt under subsection 4(2).

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[7] See also Robertson v State Farm Fire & Casualty Co, 890 F. Supp. 671, 676 (ED Mich, 1995), stating that the inquiry under subsection 4(1)(a) is not whether the conduct is subject to regulation, but rather whether the conduct is "specifically authorized."

EXHIBIT 8

Michigan Supreme Court
Lansing, Michigan 48909

Opinion

FILED JULY 25, 2002

JANICE TERRIEN, THOMAS HAGEN, and JANET THOMAS,

Plaintiffs-Appellants,

v No. 115924

LAUREL ZWIT, TIM ZWIT, KEN CLARK, and NICCI CLARK,

Defendants-Appellees.

BEFORE THE ENTIRE BENCH

MARKMAN, J.

We granted leave in this case to consider whether covenants permitting only residential uses, and expressly prohibiting commercial, industrial, or business uses, preclude the operation of a "family day care home." We also granted leave to consider whether a covenant precluding such an operation is unenforceable as violative of Michigan "public policy." The circuit court granted summary disposition in

EXHIBIT 8

favor of defendants, holding that a covenant precluding the operation of a "family day care home" is contrary to the public policy of the state of Michigan. The Court of Appeals affirmed, but for a different reason. It held that the operation of a "family day care home" is not precluded by such covenants. It concluded that, because the operation of a "family day care home" is a residential use, it could not also be a commercial or business use because the two uses are mutually exclusive. 238 Mich App 412; 605 NW2d 681 (1999). We respectfully disagree with both lower courts. A covenant barring any commercial or business enterprises is broader in scope than a covenant permitting only residential uses. Furthermore, covenants such as these do not violate Michigan public policy and are enforceable. Accordingly, we reverse the decision of the Court of Appeals and remand this case to the circuit court for entry of an order granting summary disposition in favor of plaintiffs.

I. Facts And Procedural History

All parties in this case own homes within the Spring Valley Estates subdivision in Fruitland Township.[1] Defendants each operate licensed "family day care homes" pursuant to MCL

[1] In the circuit court, the parties stipulated the essential facts. It is also undisputed that defendants ran the "family day care homes" for profit.

722.111 *et seq.* in their homes within the subdivision.[2] The subdivision is subject to the following covenants:

> 1. No part of any of the premises above described may or shall be used for other than private residential purposes.
>
> * * *
>
> 3. No lot shall be used except for residential purposes.
>
> * * *
>
> 14. No part or parcel of the above-described premises shall be used for any commercial, industrial, or business enterprises nor the storing of any equipment used in any commercial or industrial enterprise.[3]

Plaintiffs sought an injunction prohibiting the continued operation of defendants' "family day care homes." The parties agreed to file cross-motions for summary disposition before engaging in discovery. Plaintiffs moved for partial summary disposition pursuant to MCR 2.116(C)(9), and defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The circuit court denied plaintiffs' motion and granted defendants' motion, finding that a "covenant precluding the operation of a family day care home in a residential setting

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[2] "Family day care home" means a "private home in which 1 but fewer than 7 minor children are received for care and supervision for periods of less than 24 hours a day . . . ." [MCL 722.111(f)(iii).]

[3] These covenants are in the form of plat restrictions that attached to the parties' property by operation of the doctrine of reciprocal negative easement.

is contrary to the public policy of the State of Michigan." The Court of Appeals affirmed this decision. However, instead of invalidating the covenants as being against public policy, the Court concluded that defendants' operation of "family day care homes" did not violate the covenants. This Court granted plaintiffs' application for leave to appeal.

II. Standard Of Review

Because the parties have stipulated the essential facts, our concern here is only with the law: specifically, whether covenants permitting only residential uses, and expressly prohibiting commercial, industrial, or business uses, preclude the operation of a "family day care home," and, if so, whether such a restriction is unenforceable as against "public policy." These are questions of law that are reviewed de novo, *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001), which standard is identical to the standard of review for grants or denials of summary disposition. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

III. Analysis

A. Covenants

We granted leave in this case to consider whether the operation of a "family day care home" violates covenants permitting only residential uses and prohibiting commercial, industrial, or business uses. Further, assuming *arguendo* that such activities do violate the covenant, the question becomes

whether the covenant is unenforceable because it violates some "public policy" in favor of day care facilities. In *Beverly Island Ass'n v Zinger*, 113 Mich App 322; 317 NW2d 611 (1982), the Court of Appeals addressed a somewhat similar issue. There, the Court, faced with a narrower covenant that permitted only residential uses, concluded that the operation of a "family day care home" did not violate that covenant.[4] Stressing the relatively small scale of the particular day care operation and that "[t]he only observable factor which would indicate to an observer that defendants do not simply have a large family is the vehicular traffic in the morning and afternoon when the children arrive and depart," *id.* at 328, the Court found this sort of day care use to be residential in nature, and thus not a use in violation of the covenant.

Beverly Island was relied upon by the Court of Appeals in the instant matter to conclude that the day care use here was not violative of the covenants at issue. However, such reliance was misplaced, in our judgment, because, the covenant at issue in *Beverly Island* merely prohibited nonresidential uses, whereas the covenants at issue here prohibit not only nonresidential uses, but also any commercial, industrial, or

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[4] The covenant at issue in *Beverly Island, supra* at 324, provided in relevant part that "[n]o lot or building plot shall be used except for residential purposes."

business uses as well. There is a significant distinction between such restrictions, as more is prohibited in our case then was prohibited in *Beverly Island*. Not only did defendants in this case covenant not to use their property for nonresidential uses, but they also covenanted not to use their property for commercial, industrial, or business uses.

Interestingly, the *Beverly Island* Court itself recognized the distinction between a covenant permitting only residential uses and one that also expressly prohibits commercial, industrial, or business uses. Before it even began its analysis, the *Beverly Island* Court noted that the covenant at issue "permits residential uses rather than prohibiting business or commercial uses." *Id.* at 326. It further recognized that a "restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses." *Id.* While the former proscribes activities that are nonresidential in nature, the latter proscribes activities that, although perhaps residential in nature, are also commercial, industrial, or business in nature as well. The distinction between the covenants at issue here and the one at issue in *Beverly Island* was not viewed as persuasive by the Court of Appeals in this case.[5]

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[5] The Court referenced the statement made by the *Beverly Island* Court that recognized the difference between such

The Court of Appeals in this case reasoned that, because the operation of a "family day care home" does not violate a covenant permitting only residential uses,[6] the operation of a "family day care home" also does not violate a covenant prohibiting commercial, industrial, or business uses. We disagree with such reasoning. Because these are separate and distinct covenants, that an activity complies with one does not necessarily mean that the same activity complies with the other. In other words, an activity may be both residential in nature and commercial, industrial, or business in nature.

Therefore, *Beverly Island* simply does not answer the question raised here. We must determine whether the operation of a "family day care home" violates covenants prohibiting both nonresidential uses and commercial, industrial, or business uses. We find that it does.

The operation of a "family day care home" for profit is a commercial or business use of one's property. We find this to be in accord with both the common and the legal meanings of

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covenants, but stated that this statement was "mere dicta," and thus refused to follow it. *Terrien, supra* at 416-417.

[6] The only issue raised by this case is whether the operation of a "family day care home" violates covenants permitting only residential uses *and* prohibiting commercial, industrial, or business uses. Accordingly, that is the only issue we address. In particular, we do not address whether the operation of a "family day care home" violates the single covenant permitting only residential uses, i.e., the issue addressed by the Court of Appeals in *Beverly Island.*

the terms "commercial" and "business." "Commercial" is commonly defined as "able or likely to yield a profit." *Random House Webster's College Dictionary* (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." *Id.* "Business" is commonly defined as "a person . . . engaged in . . . a service." *Random House Webster's College Dictionary* (1991). "Business" is defined in legal parlance as an "[a]ctivity or enterprise for gain, benefit, advantage or livelihood." Black's Law Dictionary (6th ed).

This Court has previously discussed the meaning of "commercial" activity in a related context. In *Lanski v Montealegre*, 361 Mich 44; 104 NW2d 772 (1960), this Court addressed whether the operation of a nursing home was in violation of a reciprocal negative easement prohibiting commercial activity upon certain property. We determined that it was, observing that the circumstances were indicative of a "general plan for a *private resort area*" and that this suggested that a broad definition of "commercial" activity was intended. *Id.* at 49 (emphasis in the original). Therefore, "[i]n its broad sense commercial activity includes any type of

business or activity which is carried on for a profit." *Id.* We concluded that the operation of a nursing home was a commercial use because a fee was charged, a profit was made, the services were open to the public, and such an operation subtracted from the "general plan of the private, noncommercial resort area originally intended." *Id.* at 50.

The facts here indicate that a similar definition of commercial activity was intended. Not only does the covenant here prohibit commercial or business activities, it also prohibits the mere "storing of any equipment" used in such activities. This is a strong and emphatic statement of the restrictions' intent to prohibit any type of commercial or business use of the properties. Defendants here, through the operation of "family day care homes" are providing a service to the public in which they are making a profit.[7] Clearly, such use of their properties is a commercial or business use, as those terms are commonly and legally understood.

It is of no moment that, as defendants assert, the "family day care homes" cause no more disruption than would a large family or that harm to the neighbors may not be tangible. As we noted in *Austin v VanHorn*, 245 Mich 344, 347; 222 NW 721 (1929), "the plaintiff's right to maintain the restrictions is not affected by the extent of the damages he

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[7] We note that the operation of a "family day care home" requires a license and is regulated by the state.

might suffer for their violation." This all comes down to the well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement. As this Court said in *Oosterhouse v Brummel*, 343 Mich 283, 289; 72 NW2d 6 (1955), "'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction.'" (Citations omitted.)

B. PUBLIC POLICY

Defendants further contend that, even if the covenant here *does* prohibit the operation of these day care facilities, such a restriction should be unenforceable as against "public policy." The circuit court agreed, while the Court of Appeals did not find it necessary to reach this issue.[8]

To determine whether the covenant at issue runs afoul of

[8] The Court of Appeals indicated that Michigan public policy does, in fact, favor "family day care homes." It then concluded that, in light of this public policy, as well as the fact that the operation of a "family day care home" is residential in nature, defendants' property use did not violate the covenants. However, rather than relying on public policy to conclude that a covenant prohibiting the operation of a "family day care home" was unenforceable, as the circuit court did, the Court of Appeals relied on public policy to conclude that the covenants here did not prohibit the operation of a "family day care home."

the public policy of the state,[9] it is first necessary to discuss how a court ascertains the public policy of the state. In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law "is," not what it "ought" to be.

In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.[10] See *Twin City Pipe Line Co v Harding Glass Co,*

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[9] Covenants that are against "public policy" are unenforceable. "The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests." *Twin City Pipe Line Co v Harding Glass Co,* 283 US 353, 356-357; 51 S Ct 476; 75 L Ed 1112 (1931); *Skutt v Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936).

[10] For instance, a racial covenant would be clearly unenforceable on this basis. See *Shelley v Kraemer*, 334 US 1;

283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy.[11] As this Court has said previously:

> "As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.'" [*Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999)(citations omitted).]

Instructive to the inquiry regarding when courts should refrain from enforcing a covenant on the basis of public policy is *W R Grace & Co v Local Union 759*, 461 US 757, 766; 103 S Ct 2177; 76 L Ed 2d 298 (1983), in which the United States Supreme Court said that such a public policy must not only be "explicit," but that it also "must be well defined and

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68 S Ct 836; 92 L Ed 1161 (1948)(interpreting the Equal Protection Clause, US Const, Am XIV); *Hurd v Hodge*, 334 US 24; 68 S Ct 847; 92 L Ed 1187 (1948)(interpreting the Civil Rights Act of 1866); the federal Fair Housing Act, 42 USC 3601 *et seq.*; Michigan's Civil Rights Act, MCL 37.2101 *et seq.*; and the housing provisions of Michigan's Civil Rights Act, MCL 37.2501 *et seq.*

[11] We note that, besides constitutions, statutes, and the common law, administrative rules and regulations, and public rules of professional conduct may also constitute definitive indicators of public policy.

dominant . . . ."[12] As the United States Supreme Court has further explained:

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy. [*Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945).][13]

This Court has found no "definite indications in the law" of

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[12] In *Eastern Ass'n Coal Corp v United Mine Workers of America, District 17*, 531 US 57, 68; 121 S Ct 462; 148 L Ed 2d 354, Justice Scalia observed in a concurring opinion that "[t]here is not a single decision, since this Court washed its hands of general common-lawmaking authority, in which we have refused to enforce on 'public policy' grounds an agreement that did not violate, or provide for the violation of, some positive law." [Citation omitted.] "The problem with judicial intuition of a public policy that goes beyond the actual prohibitions of the law is that there is no way of knowing whether the apparent gaps in the law are intentional or inadvertent." *Id.*

[13] "The meaning of the phrase 'public policy' is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it." *Twin City*, *supra* at 356. As an illustration of such vagueness, "public policy" has been described as the "community common sense and common conscience" and as "abid[ing] only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man." *Skutt v Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936). Justice Kelly's dissenting opinion relies upon this definition of public policy in concluding that the covenant here is unenforceable. However, we disagree with such a nebulous definition because it would effectively allow individual judges discretion to substitute their own personal preferences for those of the public expressed through the regular processes of the law. Instead, we believe that public policy is defined by reference to the laws actually enacted into policy by the public and its representatives.

Michigan to justify the invalidation of a covenant precluding the operation of "family day care homes." Indeed, nothing has been cited, nor does our research yield anything in our constitutions, statutes, or common law that supports defendants' view that a covenant prohibiting "family day care homes" is contrary to the public policy of Michigan.

Defendants contend that "family day care homes" are a "favored use" of property, and a restriction against such a use, therefore, violates public policy.[14] Amorphous as that claim may be, even if it is true that "family day care homes" may be permitted or even encouraged by law, it does not follow that such use is a favored one. Additionally, that "family day care homes" are *permitted* by law does not indicate that private covenants barring such business activity are contrary to public policy.[15] What is missing from defendants' argument

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[14] The county zoning act, MCL 125.216g(2), and the township zoning act, MCL 125.286g(2), state that a "family day care home" "shall be considered a residential use of property for the purposes of zoning . . . ."

[15] This Court has held that the favoring of a use does not mean that such a use cannot be denied with regard to a particular parcel of land. *Kropf v Sterling Heights*, 391 Mich 139, 156-157; 215 NW2d 179 (1973). In *Kropf*, this Court concluded that a municipality can, by way of a local zoning ordinance, prohibit a "favored use" on a particular parcel of land. Similarly, private parties can, by way of a covenant, agree to prohibit a "favored use" on a particular parcel of land. Therefore, *even if* the operation of "family day care homes," is a "favored use," this is an insufficient reason for disregarding a covenant prohibiting the operation of "family day care homes" on the subject property. See *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 73-74; 222 NW 325 (1928).

is some "definitive indication" that to exclude "family day care homes" from an area by contract is incompatible with the law.[16] There is a significant distinction between something being permitted or even encouraged by law and something being required or prohibited by law.

To fail to recognize this distinction would accord the judiciary the power to examine the wisdom of private contracts in order to enforce only those contracts it deems prudent. However, it is not "the function of the courts to strike down private property agreements and to readjust those property rights in accordance with what seems reasonable upon a detached judicial view." *Oosterhouse, supra* at 289-290. Rather, absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good. See *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 73-74; 222 NW 325 (1928).[17] As we said in *Oosterhouse, supra* at 288, "[w]e do not substitute our judgment for that of the parties, particularly

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[16] For example, a covenant requiring "x" or "y" would be incompatible with a law or constitutional provision prohibiting "x" or "y;" and a covenant prohibiting "x" or "y" would be incompatible with a law or constitutional provision requiring "x" or "y."

[17] In *Johnstone*, this Court concluded that the owners of property in a subdivision subject to a covenant restricting use of property to residence purposes were entitled to just compensation upon the taking of part of such subdivision for public use in violation of such restriction.

where, as in the instant case, restrictive covenants are the means adopted by them to secure unto themselves the development of a uniform and desirable residential area." Instead, we conclude that, if covenants that prohibit "family day care homes" should not be enforced on public policy grounds, such a decision should come from the Legislature, not the judiciary.[18] The Legislature may think that it is wise to bar such covenants, but until it does so, we cannot say that they are contrary to public policy. See *Muschany, supra* at 65.

Further, although the circuit court and the Court of Appeals in this case considered what they viewed as the public policy in favor of "family day care homes," they neglected to even mention the strong competing public policy, which *is* well-grounded in the common law of Michigan, supporting the right of property owners to create and enforce covenants affecting their own property.[19] *Wood v Blancke*, 304 Mich 283,

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[18] For example, the California, Minnesota, and New Jersey Legislatures have enacted provisions voiding any covenants that prohibit "family day care homes." See Cal Health & Safety Code, § 1597.40; Minn Stat 245A.11(2); NJ Stat 40:55D-66.5b(a).

[19] Indeed, the importance of enforcing covenants is deeply entrenched in our common law. As early as 1928, it has been expressly held to be the common law of this state. *Johnstone, supra* at 74. Undergirding this right to restrict uses of property is, of course, the central vehicle for that restriction: the freedom of contract, which is even more deeply entrenched in the common law of Michigan. See *McMillan v Mich S & N I R Co*, 16 Mich 79 (1867). Justice Kelly's

287-288; 8 NW2d 67 (1943). It is a fundamental principle, both with regard to our citizens' expectations and in our jurisprudence, that property holders are free to improve their property. We have said that property owners are free to attempt to enhance the value of their "property in any lawful way, by physical improvement, psychological inducement, *contract*, or otherwise." *Johnstone, supra* at 74-75 (emphasis added). Covenants running with the land are legal instruments utilized to assist in that enhancement. A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a "valuable property right." *City of Livonia v Dep't of Social Services*, 423 Mich 466, 525; 378 NW2d 402 (1985).[20] "The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City, supra* at 356; see also *Port Huron Ed Ass'n v Port Huron*

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dissenting opinion dismisses these public policies in a short footnote.

Further, although this case implicates several claims to public policy, our resolution of this case does not require us to balance competing public policies because, as discussed above, the claim that a covenant precluding the operation of "family day care homes" violates public policy is flawed.

[20] "Restrictions for residence purposes are particularly favored by public policy and are valuable property rights." *City of Livonia, supra* at 525.

Area School Dist, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dep't of Navy v Federal Labor Relations Authority*, 295 US App DC 239, 248; 962 F2d 48 (1992)(discussing the "fundamental policy of freedom of contract" under which "parties are generally free to agree to whatever specific rules they like").

Moreover, "[r]estrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate." *Johnstone, supra* at 74. The covenants at issue here are of this sort. They expressly prohibit nonresidential uses, as well as commercial, industrial, or business uses. Clearly, the intention was to limit the use of the property in order to maintain a residential neighborhood of a specific character. As we said in *Signaigo v Begun*, 234 Mich 246, 250; 207 NW 799 (1926), "[t]he right, if it has been acquired, to live in a district uninvaded by stores, garages, business and apartment houses is a valuable right." Further, this Court "has not hesitated in proper cases to restrain by injunction the invasion of these valuable property rights." *Id.* at 251. Moreover, the "nullification of [such] restrictions [would be] a great injustice to the owners of property," *Wood, supra* at 287, because "the right of privacy for homes is a valuable right." *Johnstone, supra* at 74. It is the function of the courts to

protect such rights through the enforcement of covenants. *Wood, supra* at 287-288.

Here, we conclude that a covenant precluding the operation of a "family day care home" is not violative of the public policy of our state because there are no "definite indications" in our law of any public policy against such a covenant. Indeed, there is considerable public policy regarding the freedom of contract that affirmatively supports the enforcement of such a covenant.

IV. Response To Dissents

A. Justice Kelly's Dissent

1. Covenants

Justice Kelly's dissent first concludes that "family day care homes" are "residential in nature." *Post* at 1. However, as we have already pointed out, the issue here is not whether the operation of a "family day care home" is a residential use. Rather, the issue is whether such an operation is a commercial or business use. As we explained above, residential and commercial or business uses of property are not mutually exclusive; an activity may be both residential in nature and commercial or business in nature. Therefore, the dissent's assertion that "family day care homes" are residential in nature simply is irrelevant here, where the issue is whether the operation of a "family day care home"

violates a covenant prohibiting *commercial or business* uses.[21]

The dissent next concludes that "family day care homes" "do not violate restrictive covenants prohibiting commercial and business use." *Post* at 1. Inherent in this conclusion is that the operation of a "family day care home" is not a commercial or business use.[22] As discussed above, we disagree. The dissent criticizes us for placing "great weight on compensation," *post* at 2, in determining that the operation of a "family day care home" *is* a commercial or business use. However, it provides no explanation as to why this is an inappropriate consideration. In *Lanski, supra* at 49, in determining that the operation of a nursing home was a commercial use, this Court observed that "[a] fee is charged and a profit is made." The same is true here. The intent to make a profit is quite obviously an important element in identifying what constitutes a commercial or business

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[21] The dissent again fails to recognize this distinction when it states later that "it is impossible to conclude from the record that the family day-care homes do not conform to the ordinary and common meaning of 'use for residential purposes.'" *Post* at 4.

[22] We find it interesting that, although the dissent states that "family day care homes" are "residential in nature" and that they "do not violate restrictive covenants prohibiting commercial and business use," *post* at 1, the dissent never comes right out and states that the operation of a "family day care home" is not a commercial or business use. Perhaps, such a straightforward statement of the dissent's ultimate conclusion would call attention to the flaws underlying such a conclusion.

enterprise.[23]

The dissent next asserts that "land use should be characterized according to how the activity involved there affects the general plan of the area" rather than "the narrow approach of the majority." *Post* at 3. However, the approach that this majority has adopted is simply that, when parties enter into contracts to prohibit commercial or business uses on their properties, commercial or business uses on their properties will be prohibited.

Further, lest the dissent obscure this issue, we point out once more that the covenant before this Court states that the parties' properties are not to "be used for any commercial, or business enterprises." It does not state, as the dissent would have us understand, that the parties' properties are not to be used for any commercial, or business

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[23] The dissent relies on *City of Livonia* in an attempt to downplay the relevance of an intent to make a profit. However, the dissent fails to recognize a critical distinction between *City of Livonia* and the present case. In *City of Livonia*, the issue was whether the operation of an adult foster care home violated a covenant prohibiting *nonresidential* use, while the issue in the instant case is whether the operation of a "family day care home" violates a covenant prohibiting *commercial or business* uses. The Court in *City of Livonia* concluded that the operation of an adult foster care home was not a nonresidential use, despite the fact that its patients were required to pay for goods and services obtained there. We agree that the receipt of compensation does not necessarily make an activity nonresidential in nature. However, whether compensation is received plays a far more critical role in the determination of whether an activity is a commercial or business use.

enterprises that affect the general plan of the area or has a visible adverse effect on the residential character of the neighborhood. See *post* at 3, 6. Under the plain language of the covenant before this Court, not the covenant apparently preferred by the dissent, the parties' properties may not be used to operate a commercial or business enterprise. Period.[24] In an effort apparently to "improve" upon the actual contract created by the parties, the dissent reads words into the covenant that simply are not there.[25]

The dissent justifies its amending from the bench by asserting that "[t]he absence of a definition in the restrictive covenants" of the terms "commercial, industrial, or business enterprises" leaves these terms ambiguous, and

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[24] The dissent's statement that the land use here is not commercial or business in nature because "no showing has been made that the operation of defendants' family day-care homes had any effect on the overall residential character of their neighborhood," *post* at 3-4, is, therefore, a non-sequitur. Further, as we have explained, plaintiffs' right to enforce the covenant, as written, does not depend on whether defendants' violations of the covenant have harmed plaintiffs, although the fact that plaintiffs have initiated this lawsuit and pursued it to this Court suggests that the impact of defendants' activities upon plaintiffs are not viewed as benignly by the latter as they are by the dissent.

[25] The dissent characterizes the effect of our decision as imposing an "absolute prohibition" upon "family day care homes" on the parties' properties, and further characterizes this as the "majority's absolute prohibition." *Post* at 6. We feel impelled, however, to point out to the dissent that this is the *parties'*, not the "*majority's*," prohibition. The parties, not this Court, are the lawmakers with regard to the terms of their own contracts.

thus "opens the terms to judicial interpretation." *Post* at 6. We find this to be a remarkable proposition of law, namely, that the lack of an explicit internal definition of a term somehow equates to ambiguity—an ambiguity that apparently, in this case, allows a court free rein to conclude that a contract means whatever the court wants it to mean. Under the dissent's approach, any word that is not specifically defined within a contract becomes magically ambiguous.[26] If that were the test for determining whether a term is ambiguous, then virtually all contracts would be rife with ambiguity and, therefore, subject to what the dissent in "words mean whatever I say they mean" fashion describes as "judicial interpretation." However, fortunately for the ability of millions of Michigan citizens to structure their own personal and business affairs, this is not the test. As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).[27] Rather, if a term is not defined in a

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[26] Presumably, the dissent would apply this same novel approach to the interpretation of statutes. We note that this would be contrary to MCL 8.3a, which provides that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . ."

[27] This Court has further observed with respect to insurance contracts, "[o]mitting the definition of a word that has a common usage does not create an ambiguity within the policy." *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d

contract, we will interpret such term in accordance with its "commonly used meaning." *Id.*; *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 113-114; 595 NW2d 832 (1999).

The contract in this case clearly prohibits commercial or business uses on the covered properties. Equally clearly, the operation of a "family day care home" that makes a profit by providing a service to the public is a commercial or business use. That these interpretations should appear to the dissent to be overly "conclusory" is only, perhaps, because they involve such simple and unremarkable propositions of law.

2. PUBLIC POLICY

The dissent also concludes that, even if the covenant here *does* preclude the operation of "family day care homes," such a preclusion is contrary to public policy, and thus unenforceable. *Post* at 7. As we have already made clear, we respectfully disagree.

The dissent suggests that we unnecessarily limit our understanding of public policy to "express statutory mandates." *Post* at 10. However, as we have already explained, our view, as well as that of the United States Supreme Court, is simply that public policy must be derived

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444 (1992). "[S]imply because a policy does not define a term does not render the policy ambiguous." *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 631; 527 NW2d 760 (1994). "Instead, absent a policy definition, terms are 'given a meaning in accordance with their common usage.'" *Id.* (citation omitted).

from "definite indications" in the law. While the dissent would refuse to enforce the instant covenant absent any "definite indication" in the law, much less any "express statutory mandate," that such a covenant contravenes any public policy, we view it as our obligation to enforce a covenant under these circumstances.

As the dissent itself acknowledges, public policy is the "foundation" of our constitutions, statutes, and common law. *Post* at 8. It is precisely because of this truth that a contract that *does* violate public policy is unenforceable. However, it is also because of this truth that, where an *actual* public policy exists, rather than simply a personal policy preference of a judge, "definite indications" of an actual public policy will be found in our laws.

The dissent asserts that the majority's opinion "eviscerates the public policy doctrine" and is "contrary to this Court's long established practice." *Post* at 1, 12. Once more, we disagree. This opinion merely sets forth the unexceptional proposition that an assertion of public policy as a basis for nullifying a contract must, in fact, be grounded in a public policy. If not grounded in the constitution, the statutes, or the common law of this state, we are curious as to the dissent's basis for asserting that a policy is truly a "public" policy as opposed to merely a judge's own preferred policy. It is hard to think of a

proposition less compatible with the "rule of law" and more compatible with the "rule of men" than that a judge may concoct "public policies" from whole cloth, rather than from actual sources of the law.[28]

Finally, the dissent concludes that "restrictive covenants prohibiting family day-care homes are contrary to our state's public policy and are unenforceable." *Post* at 10. However, the only evidence that the dissent points to establishes, at most, that "family day care homes" are supported, or even encouraged, by public policy,[29] not that covenants which limit "family day care homes" upon private properties are contrary to public policy. Such evidence

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[28] The dissent remarkably criticizes the majority opinion because it will have "negative implications regarding the free use of land," *post* at 12. Needless to say, we have a rather different view than the dissent of what promotes the "free use of land." We respectfully suggest that a legal regime in which contract and property rights are respected is one more conducive to this end than a regime in which contract and property rights are subject to the arbitrary vetoes of judges deriving new "public policies" from their own consciences.

[29] The principal evidence that the dissent marshals for its conclusion that this covenant violates public policy is that the Legislature has chosen to regulate "family day care homes," that the executive branch has established an advisory committee on day care for children, and that the Court of Appeals has said in dictum that "family day care homes" are *favored* by our public policy. See also note 30. It is not clear how any of this evidence "definitely indicates" a public policy *against* covenants that prohibit "family day care homes." Again, even if public policy *does* favor such homes, this is a considerably different proposition from one that private parties are prohibited from freely entering into agreements not to use their properties for the operation of such homes.

certainly does not provide any "definite indication" that a covenant, freely entered into by private parties, prohibiting the operation of "family day care homes" on their properties, violates public policy.[30]

In summary, in the name of "public policy"—a "public policy" nowhere to be found in the actual laws of Michigan—the dissent would impose its own preferences for how a contract ought to read in place of the preferences of the parties themselves.[31]

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[30] The dissent also relies on zoning statutes to reach its conclusion that this covenant violates public policy. *Post* at 9. However, we also question the relevance of this factor. First, these statutes merely provide that "family day care homes" are to "be considered a *residential* use of property for the purposes of *zoning* . . . ." MCL 125.216g(2), MCL 125.286g(2)(emphasis added). They do not state that "family day care homes" are not a *commercial or business* use. Second, it is well settled that zoning statutes do "not purport to regulate private restrictive covenants." *City of Livonia*, *supra* at 525. "'Zoning laws determine property owners' obligations to the community at large, but do not determine the rights and obligations of parties to a private contract.'" *Id.*, quoting *Rofe v Robinson*, 415 Mich 345, 351; 329 NW2d 704 (1982). Therefore, "definitions adopted for legislative purposes in housing codes and zoning ordinances [cannot] be employed in interpreting restrictive covenants." *Oosterhouse*, *supra* at 290.

[31] Concerning the dissent's accusation that this majority "engrafts its own version of what the law should be," and that our opinion is the "embodiment of judge-made law," *post* at 12, in amazement, we can do little more than repeat what we said in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 762; 641 NW2d 567 (2002), inviting the "reader, and the citizens of Michigan, in evaluating these opinions, to reflect upon" which approach to judging is more conducive to these results—an approach in which "public policy" is determined on the basis of policies actually enacted into law by the representatives of the public, or an approach in which "public policy" is

B. Justice Weaver's Dissent

Justice Weaver's dissent sets forth two arguments that have not elsewhere been addressed in this opinion:

First, the dissent suggests that, in order to determine whether an activity is commercial or business in nature, this Court must inquire into the *type* of neighborhood to which the covenant applies. We do not understand the relevance of this inquiry. The covenant here prohibits commercial or business uses. This language could not be more direct or straightforward. We do not understand how, for example, a commercial dry cleaner is transformed from a "business" into a non-"business" because the surrounding neighborhood is middle-income or lower middle-income, because its lots are larger or smaller, because its residents are predominantly younger or older, or because its shrubbery is or is not well-tended. Rather, a business is a business, quite without reference to the type of neighborhood in which it is situated. If there is, in fact, some relevance to be derived from all these things that comprise a neighborhood in defining "business," the dissent does not tell us what this might be. The dissent offers no factors or criteria for a court to evaluate, it offers no guidance as to the particular

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fashioned out of thin air by judges and used to defeat the contracts and covenants freely entered into by the people of this state.

circumstances that should be reviewed by a court in its analysis, and it offers no direction regarding when a court should conclude that a 7-11 store, a beauty shop, or an auto body facility has been transformed into a non-"business" because of its location.

Indeed, the irrelevance of the dissent's inquiry is underscored by the obvious fact that the covenant here was only applied specifically to a *single* "neighborhood"—what was within the scope of the covenant. There are not one hundred different neighborhoods here in which "business," at least in the dissent's view, might mean something different in each instance. Rather, there is a *one* neighborhood to which the covenant applies, and there is not the slightest indication in the covenant that this altogether ordinary term, "business," was intended to mean anything other than what every person in Fruitland Township, or anywhere else in the state of Michigan, would understand it to mean. One would suppose that, had the type of neighborhood been relevant to an understanding of "business," the parties who joined into this covenant might have offered some guidance in this regard, since there is only one "type of neighborhood" to which such guidance would have been required. However, no evidence exists that these parties intended *any* of their words to have secret meanings, or to communicate something other than their ordinary meanings.

Further, we are not persuaded by the case cited by the

dissent in support of its proposition that whether an activity constitutes a "business" depends on the type of neighborhood to which the covenant applies. The dissent cites *Brown v Hojnacki*, 270 Mich 557, 561; 259 NW 152 (1935), in which this Court concluded that it was "too plain for argument" that the activity at issue there, a massage parlor, constituted a "business house of any kind," and thereby violated a covenant prohibiting the latter. In reaching this conclusion, the Court nonetheless asserted that it was appropriate to consider the "'location and character of the entire tract of land.'" *Id.* at 560-561. In light of the fact that the Court did not actually rely upon any such factor in its opinion, this statement must be viewed as dictum—dictum that apparently has not been reasserted since in this Court.

Second, the dissent contends that our opinion will "prohibit a stockbroker from working from home on his computer, an author from writing at his home office, an attorney from writing on billable time at home, or even a neighborhood child from mowing his family's and neighbors' lawns for pay." *Post* at 3. Needless to say, we have not been presented with any of these cases, and will await their appeals before deciding them. However, where agreements that have been freely reached prove flawed, they can be undone or

modified through the same process.[32] Regardless of whether this Court can "improve upon" such agreements, we are unprepared to do so by construing words to mean what they plainly do not mean.

The essential issue in this case is simply this: "Is a for-profit day-care center a 'business?'" In our judgment, it is. In our judgment, the parties to the contract in this case intended that "business" would mean "business." The approach of the dissent would undermine the stability of property law as well as contract law in Michigan by construing the words of a real estate contract to mean something other than what they clearly mean.[33]

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[32] The dissent contends that we have failed to give sufficient consideration to the fact that "the Legislature has concluded that family day care homes within neighborhoods are favored . . . ." *Post* at 5. Even assuming that "family day care homes" are "favored" or permitted, the dissent does not explain the significance of this observation. Unlike the other dissent, which makes this same observation, and concludes as a result that the "public policy" doctrine is implicated, the instant dissent makes no reference whatsoever to the "public policy" doctrine.

[33] If "business" does not mean "business," we are perplexed as to how parties to similar future contracts can ever ensure that particular uses of property will not occur. How can such future parties be any more clear or direct than the parties to the present agreement? Perhaps, the dissent would have them be required to set forth lengthy enumerations of specific businesses to be prohibited. However, once words are ignored by courts, greater precision by contracting parties in the use of words can only promise a limited degree of certainty as to how such words will be construed by these same courts in the future.

V. CONCLUSION

We conclude that the operation of a "family day care home" violates a covenant prohibiting commercial or business uses, and that such a covenant is enforceable. Accordingly, we reverse the decision of the Court of Appeals and remand to the circuit court for entry of an order granting summary disposition in favor of plaintiffs.

CORRIGAN, C.J., and TAYLOR, and YOUNG, JJ., concurred with MARKMAN, J.

S T A T E O F M I C H I G A N

SUPREME COURT

JANICE TERRIEN, THOMAS HAGEN, and JANET THOMAS,

Plaintiffs-Appellants,

v No. 115924

LAUREL ZWIT, TIM ZWIT, KEN CLARK, and NICCI CLARK,

Defendants-Appellees.

KELLY, J. (*dissenting*).

I respectfully disagree with the majority's conclusions. The analysis characterizing the operation of family day-care homes as a commercial use is conclusory, providing an unworkable standard for determining whether future uses are residential or commercial. Additionally, the opinion all but eviscerates the public policy doctrine long recognized in this state's case law.

I would hold that the family day-care homes involved here are residential in nature and do not violate restrictive covenants prohibiting commercial and business use. I would

hold also that the covenants prohibiting the operation of family day-care homes are contrary to public policy and, therefore, are unenforceable.

I. RESTRICTIVE COVENANTS

In determining that a family day-care home is a commercial or business use of real property, the majority places great weight on compensation. It relies on a single sentence contained in *Lanski v Montealegre*[1] that broadly defines commercial activity as any activity motivated by profit.

However, as evidenced in the majority's discussion of that case, profit was not the determinative factor in concluding that the defendant's nursing home was a commercial activity. Instead, the Court also considered the effect of the home's activity on the general plan of the area, which was originally intended as a private resort area. *Id.* at 49-50.

The Court used a similar approach with respect to adult foster homes in *City of Livonia v Dep't of Social Services*, 423 Mich 466; 378 NW2d 402 (1985). There it held that such homes do not violate restrictive covenants limiting land use to residential purposes and prohibiting noxious or offensive trade, manufacturing, secondhand merchandising, and wrecking businesses. The mere fact that adults living there made

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[1]361 Mich 44; 104 NW2d 772 (1960).

payments for certain items and services did not transform residential activities to commercial activities. *Id.* at 529.

These cases illustrate that land use should be characterized according to how the activity involved there affects the general plan of the area. This approach is prevalent in cases involving residential use covenants. See, e.g., *Wood v Blancke*, 304 Mich 283; 8 NW2d 67 (1943); *O'Connor v Resort Custom Bldrs, Inc*, 459 Mich 335; 591 NW2d 216 (1999); *Beverly Island Ass'n v Zinger*, 113 Mich App 322; 317 NW2d 611 (1982). While usual, ordinary, and incidental use of property as a residence does not violate a residential use restriction, unusual and extraordinary use might. The determination focuses on the particular facts of the case. *Wood, supra* at 289. No logical reason has been shown why a similar approach should not be employed in cases involving commercial and business use restrictions.

This approach also honors the intent of the parties by considering use restrictions in their entirety and in light of the particular facts of the case. It produces the proper standard for characterizing property use, not the narrow approach of the majority, which focuses on a single consideration.

Applying that analysis here, no showing has been made that the operation of defendants' family day-care homes had

any effect on the overall residential character of their neighborhood. Nor is there any evidence other than compensation that supports a conclusion that the family day-care homes were commercial or business activities. It is important to note that this case was decided on stipulated facts. As a result, the record contains limited information about the operation of the family day-care homes. It includes the parties' stipulations to the deed restrictions, defendants' operation of a family day-care home in their private residences, and the parties' ownership of land within the subdivision. There is no evidence regarding the pedestrian and vehicular traffic associated with the day-care homes or its effect on the subdivision. Thus, it is impossible to conclude from the record that the family day-care homes do not conform to the ordinary and common meaning of "use for residential purposes."

In light of these facts, the restrictive covenants do not compel a ruling for plaintiffs.[2] They address the residential

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[2]The restrictive covenants are:

> 1. No part of any of the premises above described may or shall be used for other than private residential purposes.
>
> 3. No lot shall be used except for residential purposes.
>
> 12. No noxious or offensive activity shall be
>
> (continued...)

nature of the neighborhood. To protect it, they prohibit activity that might become an annoyance to the neighborhood.

The restriction prohibiting commercial and business enterprises echoes the intent to prevent such activity. It also prohibits the storing of equipment used in a commercial or industrial enterprise, an activity that visibly changes a neighborhood. It is this visible adverse effect on the residential character of the neighborhood that the restrictions seek to prevent, not a discrete activity such as that involved here. I would conclude that the restriction prohibiting commercial and business enterprises limits those activities visibly affecting the residential nature of the

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[2](...continued)
carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

14. No part or parcel of the above described premises shall be used for any commercial, industrial, or business enterprises nor the storing of any equipment used in any commercial or industrial enterprise.

23. If the parties hereto, or any of them, or their heirs, assigns, or successors, as the case may be, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated within the bounds of the above described premises to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant, and either to prevent him or them from doing so, or to recover damages arising or resulting from such violation.

neighborhood.

It is apparent from the interpretations of the terms "commercial, industrial, or business enterprises" that have been advanced by this Court that there is considerable disagreement about their meanings. The absence of a definition in the restrictive covenants leaves the ambiguity unresolved and opens the terms to judicial interpretation. See *Craig v Bossenbery*, 134 Mich App 543, 548; 351 NW2d 596 (1984). Restrictive covenants must be reasonably construed. *Boston-Edison Protective Ass'n v Paulist Fathers, Inc*, 306 Mich 253, 257; 10 NW2d 847 (1943).[3] And they are strictly construed against the party seeking to enforce them, all doubts regarding the restrictions being resolved in favor of the free use of property. *City of Livonia, supra* at 525.

Applying these rules of construction, I cannot agree with the majority's conclusion that the restrictive covenants prohibit family day-care homes. The majority's absolute prohibition of all forms of activity generating compensation would preclude activities that normally have no visible effect on a community, such as babysitting services and freelance writing.

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[3]In *Boston-Edison Protective Ass'n*, this Court refused to interpret the terms "single dwelling house" as requiring use limited to those who are members of a single family.

The effect of the activity is relevant where the meaning of the restrictive covenants and the question of breach is uncertain. See *Oosterhouse v Brummel*, 343 Mich 283, 289; 72 NW2d 6 (1995). When considered in the context of the other restrictions, it is unlikely that the majority's broad interpretation of the covenants is what was intended. Accordingly, the effect on the neighborhood is relevant to a decision whether the operation of a family day-care home violates a covenant prohibiting commercial or business use. The majority's is an extreme construction and one that unnecessarily constrains the use of residential property.

Therefore, I would hold that the defendants' family day-care homes do not violate the restrictive covenants prohibiting commercial or business uses.

II. PUBLIC POLICY

Even if the operation of family day-care homes were violative of plaintiffs' restrictive covenants, the covenants are contrary to public policy and cannot be enforced. Public policy was defined by this Court in *Skutt v Grand Rapids*[4] and *Sipes v McGhee*, 316 Mich 614, 623-624; 25 NW2d 638 (1947):[5]

> "'What is the meaning of "public policy?" A correct definition, at once concise and

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[4]275 Mich 258, 264-265; 266 NW 344 (1936).

[5]Rev'd on other grounds in *Shelley v Kraemer*, 334 US 1; 68 S Ct 836; 92 L Ed 1161 (1948).

comprehensive, of the words "public policy," has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word "fraud" or the term "public welfare." In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

"'Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people,—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute or decree of court. It has frequently been said that such public policy is a composite of constitutional provisions, statutes and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to statute, we say it is prohibited by a statute, not by public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone—the foundation—of all constitutions, statutes, and judicial decisions, and its latitude and longitude, its height and its

> depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.'" [*Skutt, supra* at 264, quoting *Pittsburgh, C C & St L R Co v Kinney*, 95 Ohio St 64; 115 NE 505 (1916).]

Public policy is what is just, right, reasonable, and equitable for society as a whole. McNeal, *Judicially determined public policy: Is "the unruly horse" loose in Michigan?*, 13 TM Cooley L R 143, 149 (1996).

Contrary to the majority's conclusion, the public policy of this state supports family day-care homes. This fact is evidenced by the actions over time of various state entities. The Legislature has defined family day-care homes as residential uses in zoning statutes. See MCL 125.216g and 125.286g.[6] It has seen fit to regulate family day-care homes in the context of the child care licensing act for the protection of children. See MCL 722.111 *et seq.*[7]

The executive branch has addressed the issue of child care. Michigan Executive Order No. 1995-21 established an advisory committee on day care for children. The committee later issued recommendations intended to strengthen the child

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[6]Earlier cases examined zoning statutes in determining public policy. See *Craig, supra*; *McMillan v Iserman*, 120 Mich App 785; 327 NW2d 559 (1982). We know of no reason to discard this approach.

[7]This reliance is supported by reasoning in *Craig, supra*. That case relied in part on the Adult Foster Care Facility Licensing Act in determining public policy.

care system of this state. See DSS *Child Care: Making It Work*, Pub No 714 (February, 1996).

Finally, the judiciary in case law has proclaimed that Michigan public policy favors family day-care homes. For example, in *Beverly Island, supra* at 330-331, the Court of Appeals articulated that policy.

In light of these express indications, it follows that restrictive covenants prohibiting family day-care homes are contrary to our state's public policy and are unenforceable.[8] The majority's dismissal of these strong indications of public policy is baffling and disturbing. Its narrow approach to determining public policy constrains the judiciary by prohibiting it from invalidating covenants absent express statutory mandates.

But judicial decisions are an important component of public policy because they fill gaps occurring in constitutions and statutes. Constitutions, which are necessarily broad in scope, are not intended to resolve every controversy that might arise. Statutes are narrower in scope, providing rules governing society. But it is clear that the

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[8]We acknowledge that *Wood* supports property owners' contractual rights to enforce restrictive covenants. However, such restrictions cannot be enforced when they violate sound public policy. *Livonia, supra* at 525; *Oosterhouse, supra* at 286. Thus, the contractual rights of property owners cannot contravene public policy.

Legislature cannot foresee every situation likely to result in controversy. McNeal, *supra* at 143-144.

When controversy arises, it is the role of the judiciary to determine the law as it applies to the facts of the particular case. This sometimes requires the judiciary to make public policy determinations. Thus, if the courts are to decide issues presented in novel factual situations not contemplated by statute, they must necessarily have the power to determine existing public policy. *Id.* at 146.

As early as 1888, this Court acknowledged the significance of public policy. See *McNamara v Gargett*, 68 Mich 454; 36 NW 218 (1888). *McNamara* adopted a definition of public policy that considered the morals of the time and the established interest of society. *Id.* at 460. It held that a promissory note was not enforceable, reasoning that the interests of the individual must be subservient to public welfare. *Id.* at 461-462. Public policy was also considered by this Court in decisions as old as *Fetters v Wittmer Oil & Gas Properties*,[9] *Brown v Union Banking Co*,[10] and *Sellars v Lamb*.[11]

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[9]258 Mich 310; 242 NW 301 (1932).

[10]274 Mich 499; 265 NW 447 (1936).

[11]303 Mich 604; 6 NW2d 911 (1942).

Hence, the majority's refusal to weigh, as is appropriate here, public policy not codified in the law of the state is sharply contrary to this Court's long established practice. The majority fails to provide a persuasive reason for so doing. Instead, it engrafts its own version of what the law should be, discarding the knowledge and wisdom of those who came before the current Court. This is the embodiment of judge-made law.

III. CONCLUSION

The majority's reasoning contravenes established principles of law. It unreasonably characterizes land use employing only one criterion, whether monetary compensation is involved, without any consideration of the restrictions as a whole or the effect of the use on the community. This creates an unworkable standard with far-reaching negative implications regarding the free use of land.

Additionally, the majority turns its back on public policy that was developed and has been applied by this Court for decades. This too has extensive adverse implications for the jurisprudence of the state.

The operation of family day-care homes is residential in nature and does not violate restrictive covenants prohibiting commercial or business use. Additionally, restrictive covenants barring their operation are contrary to public

policy and, therefore, are unenforceable. I would affirm the Court of Appeals decision.

CAVANAGH, J., concurred with KELLY, J.

S T A T E O F M I C H I G A N

SUPREME COURT

JANICE TERRIEN, THOMAS HAGEN and
JANET THOMAS,

Plaintiffs-Appellants,

v No. 115924

LAUREL ZWIT, TIM ZWIT, KEN CLARK,
and NICCI CLARK,

Defendants-Appellees.

WEAVER, J. (*dissenting*).

I respectfully dissent from the majority opinion. I would hold that family day-care homes are not inherently incompatible with the restrictive covenants in this case, and, on the basis of the facts to which the parties have stipulated, affirm the grant of summary disposition in favor of defendants.

The issue in this case is whether the restrictive covenants that are recorded for the defendants' properties prohibit the defendants from operating licensed family day-

care homes[1] at their residences

Restrictive covenants in deeds will be construed strictly against the grantors and those claiming the right to enforce them. All doubts will be resolved in favor of the free use of property. *James v Irvine,* 141 Mich 376, 380; 104 NW 631 (1905). Deed restrictions are property rights. The courts will protect those rights if they are of value to the property owner asserting them and if the owner is not estopped from seeking enforcement. *Rofe v Robinson,* 415 Mich 345, 349; 329 NW2d 704 (1982).

The restrictions in this case provide, in pertinent part:

> 1. No part of any of the premises above described may or shall be used for other than private residential purposes.
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> * * *
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> 3. No lot shall be used except for residential purposes.
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> * * *
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> 12. No noxious or offensive activity shall be

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[1]MCL 722.111(f)(iii) provides:

> "Family day care home" means a private home in which 1 but fewer than 7 minor children are received for care and supervision for periods of less than 24 hours a day, unattended by a parent or legal guardian, except children related to an adult member of the family by blood, marriage, or adoption. Family day care home includes a home that gives care to an unrelated minor child for more than 4 weeks during a calendar year.

> carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.
>
> * * *
>
> 14. No part or parcel of the above described premises shall be used for any commercial, industrial, or business enterprises nor the storing of any equipment used in any commercial or industrial enterprise.

The majority narrowly focuses on restriction 14 and holds that any activity that creates a profit is prohibited by the restrictive covenant. I disagree with the majority's analysis, because it fails to consider the covenant as a whole and the neighborhood to which it applies. See *Lanski v Montealegre*, 361 Mich 44; 104 NW2d 772 (1960). The majority conclusion would prohibit a stockbroker from working from home on his computer, an author from writing at his home office, an attorney from writing on billable time at home, or even a neighborhood child from mowing his family's and the neighbors' lawns for pay. I do not believe that this was the intent of the parties when they entered into the covenant.[2]

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[2]The majority asserts that "where agreements that have been freely reached prove flawed, they can be undone or modified through the same process." Slip op, p 30. It is indeed the case that if all the interested parties-in this case the entire subdivision-agree to modify or revoke the covenant, that could be done. See 21 CJS, Covenants, § 33, pp 322-323. Nevertheless, it is not relevant to the key issue, determining whether the defendants' family day-care homes are (continued...)

This Court should consider more than whether the activity is designed to produce a profit. As this Court has previously said:

> [T]he rights of the parties are not to be determined by a literal interpretation of the restriction. It is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. [*Brown v Hojnacki*, 270 Mich 557, 560-561; 259 NW 152 (1935) (citations omitted).]

Thus, the Court should consider other factors, such as the purpose of the restriction and the effect on the neighborhood, in determining whether the disputed activities violated the restrictive covenant at issue. See *Lanski v Montealegre, supra*.[3] In determining the effect on the

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[2](...continued)
prohibited by the restrictive covenant at issue here.

[3]In *Lanski v Montealegre* the Court considered a covenant providing that owners "shall not use said premises for any commercial enterprise or engage in any commercial undertaking thereon . . . ." *Id.* at 46. Defendants established a convalescent home in a building formerly used as a residence. The Court said that the general plan for a private resort area indicated that a broad definition of "commerce" was intended. "In its broad sense commercial activity includes any type of business or activity which is carried on for a profit." *Id.*
(continued...)

neighborhood, the court should consider whether the covenant applies only to one individual tract of land, or to an entire neighborhood or subdivision. It is also necessary to consider the character of the surrounding neighborhood—for example, whether it is a private resort area, a single-family neighborhood, a neighborhood containing one or more apartment houses, or a mixed-use neighborhood.

Here the covenant was designed to preserve the residential nature of the subdivision and to avoid the disruption to the neighborhood that "commercial, industrial, or business enterprises" would cause. Family day-care homes, absent some special feature such as signs or intrusive lighting, do not cause such a disruption. Family day-care homes are limited to seven or fewer children, which limits the effect on neighborhoods. MCL 722.111(f)(iii). Their essential characteristics are compatible with a residential neighborhood, and they do not necessarily have any more effect on a neighborhood than any large family. Further, the Legislature has concluded that family day-care homes within neighborhoods are favored, as evidenced by the county zoning

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[3](...continued)
at 49. Nevertheless, the Court went on to examine the effect of the home on the neighborhood: "The patients, the visitors, the nurses, and the over-all atmosphere detract from the general plan of the private, noncommercial resort area originally intended." *Id.* at 49-50.

act and the township zoning act.[4] The majority fails to give this point sufficient consideration.

I conclude that operating a family day-care home does not inherently affect the residential character of the neighborhood that the covenant was designed to protect. This case was submitted on stipulated facts, and there is no indication of signs, lights, or other effects on the

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[4]In both zoning acts, it is specified that family day-care homes *shall* be considered a residential use of property, and a permitted use in all residential zones.

MCL 125.216g(2) of the county zoning act provides:

> A family day-care home licensed or registered under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zoned for single family dwellings, and shall not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone.

MCL 125.286g(2) of the township zoning act provides:

> A family day-care home licensed or registered under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zoned for single family dwellings, and shall not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone.

neighborhood that would cause the family day-care homes to be in violation of the restrictive covenant. Accordingly, I would affirm the grant of summary disposition in favor of the defendants.

EXHIBIT 9

(a) when the grounds asserted do not appear on the face of the pleadings, or

(b) when judgment is sought based on subrule (C)(10).

(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

(5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)–(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).

(6) Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)—(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

(H) Affidavits Unavailable.

(1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must

(a) name these persons and state why their testimony cannot be procured, and

(b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

(2) When this kind of affidavit is filed, the court may enter an appropriate order, including an order

(a) denying the motion, or

(b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

(I) Disposition by Court; Immediate Trial.

(1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

(3) A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.

(4) The court may postpone until trial the hearing and decision on a matter involving disputed issues of fact brought before it under this rule.

(5) If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.

(J) Motion Denied; Case Not Fully Adjudicated on Motion.

(1) If a motion under this rule is denied, or if the decision does not dispose of the entire action or grant all the relief demanded, the action must proceed to final judgment. The court may:

(a) set the time for further pleadings or amendments required;

(b) examine the evidence before it and, by questioning the attorneys, ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed; and

(c) set the date on which all discovery must be completed.

(2) A party aggrieved by a decision of the court entered under this rule may:

(a) seek interlocutory leave to appeal as provided for by these rules;

(b) claim an immediate appeal as of right if the judgment entered by the court constitutes a final judgment under MCR 2.604(B); or

(c) proceed to final judgment and raise errors of the court committed under this rule in an appeal taken from final judgment.

[Adopted effective March 1, 1985. Amended December 11, 1986, effective December 12, 1986, 426 Mich; October 18, 1990, effective January 1, 1991, 436 Mich; January 17, 1992, effective April 1, 1992, 439 Mich. Amended effective September 19, 1995, 450 Mich. Amended October 3, 2000, effective January 1, 2001, 463 Mich; May 22, 2007, effective September 1, 2007, 478 Mich; October 3, 2012, effective January 1, 2013, Mich; May 24, 2017, effective September 1, 2017, 500 Mich; August 30, 2018, effective September 1, 2018, 502 Mich; September 18, 2019, effective January 1, 2020, 503 Mich.]

Comments

Staff Comment to 1985 Adoption

MCR 2.116 consolidates and reorganizes the provisions regarding summary disposition of claims or defenses found in GCR 1963, 111.10, 116, and 117. Much of the substance of the rules remains the same, although procedural provisions formerly applicable only to rule 116 or rule 117 are made applicable to all portions of the new rule.

Subrule (A) is the procedure for judgment on stipulated facts found in GCR 1963, 111.10.

Subrule (B) is derived from GCR 1963, 117.1. The language is modified to indicate that not all such motions seek "judgment" on a claim. Sometimes the relief sought is dismissal (for example, when the motion challenges service of process or jurisdiction).

Under GCR 1963, 117.1 a party seeking to recover on a claim could not file a motion until the adverse party had responded. Under subrule (B)(2), the motion may be *filed* at any time, but the claimant may not notice it for hearing until the time for answer has passed.

The [March 1, 1985] amendment of MCR 2.116(B)(2) corrects the cross-reference to subrule (D), which covers the time for raising defenses.